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# Aviation Guest Laws: A Modern Anachronism

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# AVIATION GUEST LAWS: A MODERN ANACHRONISM

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*Polonius*: "What do you read, my lord?"
*Hamlet*: "Words, words, words."

Shakespeare, *Hamlet*,
Act II, Scene 2.

And so it is with aviation accident litigation involving guest laws. Sixteen jurisdictions in the United States have enacted guest statutes that apply to aviation tort claims.[1] Each statute was patterned after the automobile guest statutes then in effect in each state.[2] Georgia applies a similar rule to automobile and aviation activity as part of her common-law. Such rules of law reduce in varying degrees the standard of care owed by a host to a guest in the aircraft.

## I. INTRODUCTION

The overall impact of these reduced standards of care upon aviation litigation is our present concern; but, before attempting to unravel the intricacies of these rules of law, let's briefly examine the history of their emergence. For present purposes, suffice it to say that a "guest" in an aircraft is one who rides gratuitously and at the favor of the owner or operator.[3]

The long judicial journey of the doctrine that one who performs a gratuitous undertaking owes only a duty of slight care began in 1703 in England.[4] There Chief Justice Lord Holt held that a gratuitous bailee of a cask of brandy could not be held liable for his ordinary negligence to the bailor. It took some time, but Lord Holt's view of the Roman civil law[5] drifted across the Atlantic and in 1917 found fertile soil in the Supreme Judicial Court of Massachusetts. In *Massaletti v. Fitzroy*[6] that

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[1] Arkansas (1955), California (1933), Delaware (1949), Idaho (1965), Illinois (1949), Indiana (1951), Michigan (1945), Nebraska (1959), Nevada (1953), New Mexico (1953), North Dakota (1959), Ohio (1955), Oregon (1949), South Carolina (1930), South Dakota (1949) and Utah (1953); *see* Appendix for text and citation of each statute.

[2] ARK. STAT. ANN. § 75-913 (1947); CAL. VEHICLE CODE § 17158 (West 1960); DELAWARE CODE ANN. § 6101 (1953); IDAHO CODE ANN. §§ 49-1401 (1949); ILL. ANN. STAT., ch. 95½, § 9-201 (Smith-Hurd 1961); IND. STAT., §§ 47-1021, 1022 (1964), MICH. COMP. LAWS § 257.401 (1967); NEB. REV. STAT. § 39-740 (1966); NEV. REV. STAT. § 41.180 (1967); N.M. STAT. ANN. §§ 64-24-1, 64-24-2 (1953); N.D. CENT. CODE §§ 39-15-01 to 39-15-03 (1959); OHIO REV. CODE ANN. § 45-15.02 (Page 1953); ORE. REV. STAT. § 46-801 (1962); S.D. CODE §§ 32-34-1, 32-34-2 (1967); UTAH CODE ANN. §§ 41-9-1, 41-9-2 (1953).

[3] *See* W. PROSSER, TORTS 191 (3d ed. 1964). A more detailed analysis follows.

[4] Coggs v. Bernard, 92 Eng. Rep. 107 (Ex. 1703).

[5] *See* ORE. L. REV. 216, 217 (1954).

[6] 228 Mass. 487, 118 N.E. 168 (1917).

Court applied Lord Holt's ruling to a case brought by a gratuitous rider in an automobile against the driver. He sought money damages from the driver on the basis of the driver's ordinary negligence. The Court held that since the ride was a gratuitous undertaking, the "guest" had to prove a greater degree of negligence.[7] The Massachusetts Rule, as it came to be known, failed to receive wide acceptance as an expression of Anglo-American common-law. Georgia,[8] Virginia,[9] and Washington[10] adopted the reduced standard of care toward automobile guests as their common-law. The overwhelming majority of jurisdictions in the English speaking portion of the Western Hemisphere refused to engraft such a rule on to their common-law.[11] Thus, until 1927, the majority rule was that the driver of a motor vehicle, and *a fortiori*, the pilot of an aircraft, owed a duty of reasonable care to gratuitous riders.[12] In that year Connecticut became the first American jurisdiction to enact a "Guest Statute."[13] Although, ironically, Connecticut repealed its automobile guest statute ten years later,[14] the dye had been cast. From 1927 to the passage of the last automobile guest statute in 1938, twenty-eight additional states adopted the minority rule by legislative enactment.[15] Twenty United States jurisdictions failed to succumb and have no guest laws.[16] There is virtually unanimous agreement that the economic and political force behind this legislative onslaught was the liability insurance industry.[17]

Thus, there was laid the historical basis for the application of the doc-

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[7] *See* note 5 *supra*, at 219..

[8] Hall v. Slaton, 40 Ga. App. 288, 149 S.E. 306 (1929).

[9] Boggs v. Plybon, 157 Va. 30, 160 S.E. 77 (1931).

[10] Blood v. Austin, 149 Wash. 41, 270 P. 103 (1928).

[11] *See* Joost, *The Automobile Guest Rule*, 2 PORTIA L.J. 105, 107-08 (1966), note 12 for cases holding that the following jurisdictions refused to follow the Massachusetts Rule: Alaska, Connecticut, Kentucky, Louisiana, Maine, Mississippi, New Jersey, New York, North Carolina, Vermont and Wisconsin; Black v. Goldweber, 172 Ark. 862, 291 S.W. 76 (1927); Munson v. Rupker, 148 N.E. 169 (Ind. App. 1925); McInnery v. McDougall, 47 Manitoba Rep. 119 (1937).

[12] The majority rule was well stated in Avery v. Thompson, 117 Me. 120, 128, 103 A. 4, 7 (1918): " . . . we conceive the true rule to be that the gratuitous undertaker shall be mindful of the life and limb of his guest and shall not unreasonably expose her to additional peril. This would seem to be a sound, sane, and workable rule; one consistent with established legal principles and just to both parties."

[13] CONN. GEN. REV. STAT. Ch. 308 (1927).

[14] CONN. GEN. REV. STAT. Ch. 270, § 351(d) (1937).

[15] Alabama (1935), Arkansas (1935), California (1929), Colorado (1931), Delaware (1935), Florida (1937), Idaho (1931), Illinois (1935), Indiana (1929), Iowa (1927), Kansas (1931), Kentucky (1930)—*held* constitutional, Ludwig v. Johnson, 243 Kt. App. 533, 49 S.W.2d 347 (1932), Montana (1931), Nebraska (1931), Nevada (1933), New Mexico (1935), North Dakota (1931), Ohio (1934), Oregon (1929), South Carolina (1930), South Dakota (1933), Texas (1931), Utah (1935), Vermont (1929), Virginia (1938), Washington (1937), and Wyoming (1931); for a criticism of this rejection of the majority rule, *see* Note, 10 U. CIN. L. REV. 289, 293-94 (1936).

[16] Alaska, Arizona, District of Columbia, Hawaii, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, Tennessee, West Virginia, and Wisconsin.

[17] *See* Burghardt v. Olson, 223 Ore. 155, 354 P.2d 871, 879 (1960); PROSSER, *supra*, at 190-91; 2 M. MALCOLM, AUTOMOBILE GUEST LAW (1937); Comment, 19 BAYLOR L. REV. 75, 78 (1967); Note, 17 Hastings L.J. 337 (1965); TIPTON, *Florida's Automobile Guest Statute*, 11 U. Fla. L. Rev. 287, 288 (1958); Comment, 5 KAN. L. REV. 722, 723 (1957); Georgetta, *The Major Issues in a Guest Case*, 1954 INS. L.J. 583 (1954); Comment, 26 CAL. L. REV. 251, 252 (1938); Weber, *Guest Statutes*, 11 CIN. L. REV. 24, 35 (1937); Cornish, *The Automobile Guest*, 14 BOS. U. L. REV. 728, 751 (1934); and Comment, *The Liability of An Automobile Driver to a Non-Paying Passenger*, 20 VA. L. REV. 326, 328 (1933).

trine of a diminished standard of care towards gratuitous riders in aircraft. Although in the 1930's, South Carolina and California enacted guest statutes applicable to aircraft, the remaining fourteen statutes did not come into being until after 1948.[18] Georgia joined the ranks in 1952 when the intermediate appellate court extended the Massachusetts Rule to gratuitous riders in aircraft.[19] Apparently Massachusetts has not firmly committed herself to a similar rule.[20]

There are eleven states with automobile guest statutes that do not apply a similar rule to aircraft.[21] Of those, Florida,[22] Kansas,[23] Ohio[24] and Virginia[25] have refused to accept the arguments made by the insurance industry that "aircraft" should be equated with "motor vehicle" as used in the automobile guests statutes. During the period of repeal of California's aviation guest statute, from 1947 to 1949, the attorney general came to the same conclusion.[26] Hence, the majority rule appears to be that without definitive legislation action, automobile guest statutes will not be applied to aircraft.[27]

The stated reasons and purposes for automobile and aviation guest statutes have been somewhat consistent in this very inconsistent area of tort law. There were two primary policy considerations underlying their enactment:

> 1. The 'inherent feeling that it was unjust to permit the benefactor of a person taking a free ride to be penalized by his guest passenger for an act of kindness, hospitality or sociability for which the benefactor received no reward or benefit whatever.'[28]
>
> 2. Prevention of fraud and collusion between the driver and his guest so as to obtain money from the driver's liability insurance carrier.[29]

[18] *See* note 1, *supra*, and the Appendix.

[19] Sammons v. Webb, 86 Ga. App. 382, 71 S.E.2d 832 (1952).

[20] Wilson v. Colonial Air Transport, Inc., 278 Mass. 420, 180 N.E. 212 (1932); Rich v. Finley, 325 Mass. 99, 89 N.E.2d 213, 219 (1949); Walthew v. Davis, 201 Va. 557, 561-62, 111 S.E.2d 784 (1960); Hardman, *Aviation Guest Statutes*, 1962 INS. L.J. 561, 562, note 3.

[21] Alabama, Colorado, Florida, Iowa, Kansas, Montana, Texas, Vermont, Virginia, Washington and Wyoming. For an excellent, but brief summary of automobile guest law, *see* Morrison and Arnold, *Automobile Guest Law Today*, 27 Ins. Counsel J. 223 (1960).

[22] Gridley v. Cardenas, 3 Wis.2d 623, 627, 89 N.W.2d 286 (1958) (applying Florida law); earlier the Florida Supreme Court had declined to consider the matter in Sieverts v. Loffer, 45 So.2d 483 (1950); Note, 10 Mercer L. Rev. 213, 215 (1958).

[23] Hayden v. Boyle, 174 Kan. 140, 145, 254 P.2d 813 (1953).

[24] Hanson v. Lewis, 26 Ohio Abs. 105, 1 Av. L. REP. 730 (Com. Pl. 1937).

[25] Not only did Virginia refuse to apply its automobile guest statute to aircraft, but it distinguished automobile travel from air travel and refused to apply its common-law rule of reduced care. Walthew v. Davis, *supra* note 20, at 561.

[26] 12 OP. ATT'Y GEN. 28, 29 (Cal. 1948).

[27] *See* Orr, *Airplane Tort Law*, 4 S.C. L.Q. 193, 206 (1951-52); 165 A.L.R. 916 (1946).

[28] Lowe, *Suggestions for the Trial of Auto Damage Suits*, 16 IND. L.J. 288, 289 (1940-41); *see also* Sand v. Mahnan, 248 Cal. App. 2d 679, 683, 56 Cal. Rptr. 691 (1967); Jensen v. Mower, 4 Utah 2d 336, 294 P.2d 683 (1956); PROSSER, *supra*, at 191; Lasher, *Hard Laws Make Bad Cases*, 9 Santa Clara Lawyer 1, 15 (1968); Comment, *Judicial Nullification of Guest Statutes*, 41 S. CAL. L. REV. 884, 885 (1968); Comment, 54 N.W. U. L. Rev. 263, 265 (1959); Note, 1 WYO. L. REV. 182, 183 (1947); Comment, 18 CAL. L. REV. 184 (1930): ". . . there is a very prevalent feeling that such suits should be discouraged, inasmuch as they are unsportsmanlike and an abuse of hospitality . . . ."

[29] Ward v. George, 112 S.W.2d 30, 32 (Ark., 1937); Kitchens v. Duffield, 79 N.E.2d 906 (Ohio, 1948); Schlim v. Gau, 80 S.D. 403, 125 N.W.2d 174, 177 (1963); Joost, *supra* at 111, *see* note 11; Appleman, *Wilful and Wanton Conduct in Automobile Guest Cases*, 13 IND. L.J. 131, 135 (1937); Note, 8 WESTERN RES. L. REV. 170, 172 (1957); Note, 4 U. FLA. L. REV. 79 (1951); Note, 35 MICH. L. REV. 804, 805 (1937).

The former consideration was based on an economic by-product of the depression; to wit, the hitch-hiker.[30] With economic panic, unemployment and extensive job hunting, there was a tremendous increase in people seeking free rides; hence, the flourish of automobile guest statutes desirable economic force ever afflict aviation.

Much has been written about the second major reason for guest statutes, but the casualty insurance industry has presented no data showing the number of "collusive" suits filed and adverse jury verdicts returned.

Two secondary reasons advanced for the enactment or continued existence of guest statutes can be gleaned from the cases and the writers:

1. Loss payouts to guests increased insurance rates and premiums;[31] and
2. So many lawsuits were being filed by guests that they hampered the judicial administration of justice.[32]

Again, there has been very little data presented upon which one could judge the validity in a positive manner of either of these propositions.[33]

So much for the history and rationale of guest statutes in general. Let us now turn to the specific problems the aviation guests statutes or laws create for the litigation processes.

At the outset it should be noted that in terms of legal history we have had relatively little time within which to develop sufficient decisional interpretation of the specific aviation guest laws. However, since the various aviation statutes were directly patterned after their automobile counterparts, courts and writers have looked to judicial interpretations of the comparable statutory language in the automobile statutes.[34] The general issues raised by guest laws in aircraft accident litigation are not radically different than those the bench and bar have faced for years in automobile accident litigation; i.e., who is a "guest?", and, if the plaintiff was a "guest," what showing will suffice to constitute the appropriate degree of aggravated culpability? Further, since certain of the later aviation guest statutes were patterned after earlier aviation or automobile statutes, it is not uncommon for the courts to look to other jurisdictions for decisional assistance.[35] Finally, before launching into a more particularized discussion, it is important to bear in mind two general rules of interpretation and construction of these statutes:

1. Since guest statutes are in open derogation of the common-law, they must be construed strictly, so that every benefit of the doubt should be weighed in favor of non-applicability;[36] and,

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[30] PROSSER, *supra* at 191, note 83.

[31] Note, 1 WYO. L.J. 182, 183 (1947).

[32] Malcolm, *supra* at 2; *see* Appleman, note 29; De Lacy, *Trials Under the Guest Statute*, 15 NEB. L. BULL. 306, 307 (1936).

[33] These expressed reasons in support of guest statutes will be discussed in greater detail in the concluding section of this article.

[34] Halbert v. Berlinger, 127 Cal. App. 2d 6, 18-19, 273 P.2d 274 (1954); Whittemore v. Lockheed Aircraft Corp., 51 Cal. App. 2d 605, 609, 125 P.2d 531 (1942); Note, 16 S. CAL. L. REV. 358, 359 (1943).

[35] Smith v. Meadows, 56 N.M. 242, 242 P.2d 1006 (1952); Fulghum v. Bleakley, 177 S.C. 286, 181 S.E. 30 (1935); Melby v. Anderson, 64 S.D. 249, 266 N.W. 135 (1936).

[36] This is clearly the majority rule in the United States. *See* Whittecar v. Cheatham, 226 Ark. 31, 287 S.W.2d 578, 579 (1956); Morrison v. Townley, 269 Cal. App. 2d 863, 75 Cal. Rptr.

2. Each case is *sui generis* on its facts.[37]

In summary, our interest here is to explore the impact upon aviation litigation of the aviation guest laws of Arkansas, California, Delaware, Georgia, Idaho, Illinois, Indiana, Michigan, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oregon, South Carolina, South Dakota, and Utah.

The threshold question in any such inquiry is whether these laws, either statutory or decisional, are constitutionally valid exercises of state police power.

## II. Constitutionality of Aviation Guest Laws

The constitutionality of aviation guest laws has not been directly determined by an appellate court as of this writing. However, there has been extensive litigation regarding the various aspects of the constitutionality of their statutory companions, the automobile guest laws.[38]

The early assaults were predicated upon either or both of two grounds:

1. The guest statutes violated certain state constitutional provisions that protected the right of the individual to have a remedy for wrongfully inflicted injury,[39] to have speedy access to the courts[40] and to have no limitations on recoveries for wrongful death;[41] and
2. The classification "guest" was arbitrary and unreasonable, and was thus in contravention of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[42]

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274 (1969); Mumford v. Robinson, 231 A.2d 477, 479 (Del. 1967); Summers v. Summers, 40 Ill. 2d 338, 239 N.E.2d 795 (1968); Baldwin v. Hill, 315 F.2d 738 (6th Cir. 1963) (applying Michigan law); Clinger v. Duncan, 166 Ohio St. 216, 141 N.E.2d 156 (1957); 2 Harper & James, The Law of Torts 961 (1956); Comment, 26 Cal. L. Rev. 251, 252 (1938). The rule in South Dakota has just been reversed. Statutes in derogation of the common-law are to be liberally construed so as to give maximum effect to their intended purpose. S.D. Code § 2-14-12 (1967); and Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941).

[37] Anderson v. Lippes, 18 Mich. App. 281, 170 N.W.2d 908 (1969).

[38] *See* 111 A.L.R. 1011 (1937).

[39] The following cases rejected plaintiff's argument and upheld the validity of the guest statutes on this point: Forsman v. Colton, 136 Cal. App. 97, 28 P.2d 429 (1933); Vogts v. Guerrette, 142 Colo. 527, 351 P.2d 851 (1960); Clarke v. Storchak, 384 Ill. 564, 52 N.E.2d 229 (1943); Bailey v. Resner, 168 Kan. 439, 214 P.2d 323 (1950); Wright's Estate v. Pizel, 168 Kan. 493, 214 P.2d 328 (1950); Rogers v. Brown, 129 Neb. 9, 260 N.W. 794 (1935); Perozzi v. Ganiere, 149 Ore. 330, 40 P.2d 1009 (1935); Stewart v. Houk, 127 Ore. 589, 271 P. 998, 272 P. 893 (1928); Elkins v. Foster, 101 S.W.2d 294 (Tex. Civ. App. 1936); Campbell v. Paschall, 132 Tex. 226, 121 S.W.2d 593 (1938). *See also* De Lacy, *Trials Under the Guest Statute*, 15 Neb. L. Bull. 306 (1936). The Kentucky guest statute was held unconstitutional, however, in Ludwig v. Johnson, 243 Ky. 533, 49 S.W.2d 347 (1932), in part on the ground that it violated § 14 of the Kentucky Constitution, which preserved a remedy for injury wrongfully inflicted. *See* Weber, *Guest Statutes*, 11 U. Cin. L. Rev. 24, 30-33 (1937).

[40] The following cases rejected plaintiff's argument and held that the guest statutes did not deny them access to the courts: Roberson v. Roberson, 193 Ark. 9, 101 S.W.2d 961 (1937); McMillan v. Nelson, 149 Fla. 334, 5 So.2d 867 (1942); Rector v. Hyer, 35 Ohio Abs. 451, 41 N.E.2d 886 (1941); Hillock v. Heilman, 201 So.2d 544 (Fla. 1967).

[41] Plaintiffs' argument was rejected in Smith v. Williams, 51 Ohio App. 464, 1 N.E.2d 643 (1935), where the court held that the guest statute did not deprive one of a remedy for wrongful death. For parallel reasoning based on a partially different Constitutional provision, *see* Bowman v. Puckett, 144 Tex. 125, 188 S.W.2d 571 (1945), and Paschall v. Gulf, C. & S. F. Ry. Co., 100 S.W.2d 183 (Tex. Civ. App. 1936). The Kentucky automobile guest statute, however, was held unconstitutional in Ludwig v. Johnson, *supra*, in part on the ground that it violated § 241 of the Kentucky Constitution, which created a cause of action for wrongful death.

[42] Plaintiffs' arguments have so far been constantly rejected. Silver v. Silver, 280 U.S. 117 (1929); Pickett v. Matthews, 238 Ala. 542, 192 So. 261 (1939); Harlow v. Ryland, 172 F.2d 784

Heretofore, those courts that have faced these issues have, for the most part, found the automobile guest statutes constitutionally sound.

In view of the often harsh and inhumane results caused by these statutes, there is every reason to believe that plaintiffs will persist in their efforts to reverse this trend of judicial opinion. Theories now advanced are moving away from the cold and sterile legalistic formulas of unreasonable classification and lack of access to courtrooms. In California[43] and Colorado[44] it has been strongly argued that one protected inalienable right of man is the right to be free from wrongful injury or death at the hand of another. Such a right is innate in man and cannot be tampered with by government. Indeed, it is government's sacred duty to protect the individual from wrongful harm. As of this writing, the appellate courts in both jurisdictions have rejected the "Rights-of-Man" theory.[45] However, there were very strong dissents in the opinions of the Colorado Supreme Court.[46] In view of the current concern over protecting human rights when they conflict with property rights, it is safe to say that the appellate courts have not heard the end of the "Rights-of-Man" theory.

A recent California case provides another possible constitutional defect in the various aviation guest laws in the United States. In *Blevins v. Sfetku*,[47] Justice Hufstedler[48] of the District Court of Appeals held, for the unanimous Court, that the California Motorboat Guest Statute was unconstitutional. She reasoned that the reduced standard of care condoned by the guest statute conflicted with the higher standard of conduct established by the federal Motorboat Act of 1940. Therefore, California was precluded by the Supremacy Clause[49] of the United States Constitution from enforcing the motorboat guest statute in a personal injury case arising on the Colorado River between California and Arizona.

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(6th Cir. 1949) (involving the Arkansas Statute); O'Donnall v. Mullaney, 66 Cal. 2d 994, 429 P.2d 160 (1967); Stephen v. Proctor, 235 Cal. App. 2d 228, 45 Cal. Rptr. 124 (1965); Ferreira v. Barham, 230 Cal. App. 2d 128, 40 Cal. Rptr. 739 (1964); Romero v. Tilton, 78 N.M. 696, 437 P.2d 157 (1967); Gallegher v. Davis, 37 Del. 380, 183 A. 620 (1936); Smith v. Williams, *supra* note 41; Shea v. Olson, 185 Wash. 143, 53 P.2d 615, 186 Wash. 700, 59 P.2d 1183 (1936). For a critical analysis of the precedential strength of the Silver case, *see* Lascher, *Hard Laws Make Bad Cases*, 9 SANTA CLARA LAWYER 1, 5 (1968). The Silver case was cited with approval in Sorrell v. White, 103 Vt. 277, 153 A. 359 (1931), but the court did not expressly rule on the constitutionality of the Vermont automobile guest statute. Similarly, it has been held not in violation of the Fourteenth Amendment for a state legislature to distinguish between an owner-rider who gives compensation to the driver and a nonowner-rider who does likewise. Patton v. La Bree, 60 Cal. 2d 606, 387 P.2d 398 (1963), with a strong dissent by Justice Raymond Peters. This issue was argued, but not decided in Ludwig v. Johnson, *supra* note 39.

[43] Ferreira v. Barham, 230 Cal. App. 2d 128, 129, 135, 40 Cal. Rptr. 739 (1964).

[44] Taylor v. Welle, 143 Colo. 37, 352 P.2d 106 (1960); Vogts v. Guerrette, 142 Colo. 527, 351 P.2d 851 (1960); Coffman v. Godsoe, 142 Colo. 575, 351 P.2d 808 (1960); Noakes v. Gaiser, 136 Colo. 73, 315 P.2d 183 (1957).

[45] Ferreira, *supra* at Cal. App. 2d 135; Vogts, *supra* at P.2d 862.

[46] Vogts, *supra* at P.2d 863: "This opinion is more than just a dissent—it is a warning and the sounding of an alarm. In the ultimate the stakes in this case are high: the rights of man as an individual and person are under fire. . . . if the opinion shall be that the Guest Statute is valid, it shall be accepted for what it is: a derogation of the 'natural, essential and inalienable' rights of man which we as judges are sworn to *protect and enforce*."

[47] 259 Cal. App. 2d 527, 66 Cal. Rptr. 486 (1968).

[48] Subsequent to the Blevins opinion,,, Justice Hufsteder was nominated and confirmed to the United States Circuit Court of Appeals for the Ninth Circuit and was sworn in on October 1, 1968.

[49] Art. VI, Cl. 2.

The *Blevins* case provides an excellent analogy to the situation in aviation accident litigation. All aviation guest laws reduce the standard of care or conduct owed by an airman to his "guest." Those standards vary from "gross negligence" in Georgia, Idaho, Michigan, Nevada, North Dakota and Oregon at one end of the spectrum to "wilful misconduct" in California, Illinois, Indiana, Nevada, Ohio, South Dakota and Utah at the other. These standards would compare with the "wilful misconduct" duty of the California Motorboat Guest Statute.[50] In conflict with this standard of conduct is that created by Federal Aviation Regulation § 91.9:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.[51]

There can be no doubt that such regulations have the full force and effect of federal law within the meaning of the term "laws" in the Supremacy Clause.[52] To this writer's knowledge no appellate court has ruled on this issue as of this writing.[53]

Before turning to a particularized analysis of the provisions of these aviation guest statutes, we must consider the problem of choice of the applicable law in accidents having multi-state contacts.

## III. Choice of Law

In light of the tremendous territorial mobility of aircraft today, it is very common for each aviation accident to have many contacts with several jurisdictions. Consequently, the bench and bar are usually faced with serious and complex choice of law problems in such litigation.[54] It is not the intended purpose here to explore the totality of choice of law problems in aviation accident litigation, but rather, to restrict the inquiry to the applicable rules in regard to cases involving aviation guest laws.

The general common-law rule was that the forum had to apply the substantive law of the jurisdiction wherein the tort occurred; i.e. *lex loci delicti.* The choice of law analysis under that rule was quick and easy, if not always just and rational. For all practical matters, the law of the spot where the aircraft impacted with the earth would be applied. If that law provided a diminished standard of care as to a "guest," then it would be applied, because such laws are "substantive" for the purpose of conflict of laws characterization.[55] And so it was until the 1960's.[56] Of those sixteen states where there is no question that the guest law applies to aviation,

[50] Cal. Harb. & Nav. Code § 661.1 (West 1966).

[51] 28 Fed. Reg. 6704 (June 29, 1963).

[52] *See* Stanley v. United States, 239 F. Supp. 973, 975 (N.D. Ohio 1965); Lange v. Nelson-Ryan Flight Service, Inc., 259 Minn. 460, 108 N.W.2d 428 (1961).

[53] The issue is presently pending before the First District of the California District Court of Appeals in Mittelman v. Seifert (1st D. Cal., filed ————).

[54] *See* Scott v. Eastern Air Lines, Inc., 399 F.2d 14 (3d Cir. 1968); Hopkins v. Lockheed Aircraft Corp., 394 F.2d 656 (5th Cir. 1968); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); and Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961).

[55] Friday v. Smoot, 211 A.2d 594, 595 (Del. 1965).

[56] *See* Schnake and Murad, *Conflict of Laws*, 16 Hastings L.J. 42, 45 (1964); Ehrenzweig, *Guest Statutes in the Conflict of Laws*, 69 Yale L.J. 595, 600-01 (1959); *Choice of Law in Application of Automobile Guest Statutes*, 95 A.L.R.2d 12 (1964).

at least ten still adhere to *lex loci delicti*: Arkansas,[57] Delaware,[58] Georgia,[59] Idaho,[60] Michigan,[61] Nebraska,[62] Nevada,[63] South Carolina,[64] South Dakota,[65] and Utah.[66]

The resolution in the field of conflicts of law has affected guest law litigation. No longer can we say with any assurance that the substantive law of the situs of the accident will apply. At least five jurisdictions with aviation guest laws have adopted the new rule: California,[67] Indiana,[68] North Dakota,[69] Ohio,[70] and Oregon.[71]

Whether Illinois has adopted the modern rule is somewhat problematical. At the very least it can be said that its court have rejected the simplistic *lex loci* analysis and will apply Illinois law to a foreign accident on issues related to interspousal immunity, application of the Illinois Dram Shop Act and wrongful death damages.[72]

[57] McGinty v. Ballentine Produce, Inc., 241 Ark. 533, 408 S.W.2d 891 (1966).

[58] Folk v. York-Shipley, Inc., 239 A.2d 236 (Del. 1968).

[59] Hamby v. Hamby, 103 Ga. App. 826, 121 S.E.2d 169 (1961).

[60] George v. Stanfield, 33 F. Supp. 486 (N.D. D. 1940).

[61] Abendschein v. Farrell, 382 Mich. 510, 170 N.W.2d 137 (1969).

[62] Yanney v. Nemer, 154 Neb. 188, 47 N.W.2d 368 (1951).

[63] Campbell v. Baskin, 69 Nev. 108, 242 P.2d 290 (1952).

[64] Griffin v. Planters Chemical Corp., 302 F. Supp. 937 (D. S.C. 1969); Oshiek v. Oshiek, 244 S.C. 249, 136 S.E.2d 303 (1964).

[65] McMahon v. De Kraay, 70 S.D. 180, 16 N.W.2d 308 (1944).

[66] Wood v. Taylor, 8 Utah 2d 210, 332 P.2d 215 (1958).

[67] Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727 (1967).

[68] Witherspoon v. Salm, 237 N.E.2d 116 (Ind. App. 1968).

[69] Merchants Nat'l Bank & Trust Co. of Fargo v. U.S., 272 F. Supp. 409 (D. N.D. 1967).

[70] Thigpen v. Greyhound Lines, Inc., 229 N.E.2d 107 (Ohio App. 1967).

[71] DeFoor v. Lematta, 249 Ore. 116, 437 P.2d 107 (1968).

[72] In Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966), the court refused to apply the law of the situs of the tort, Florida, on the issue of whether a wife could sue her husband in tort:

> The fact that the alleged tortious act took place in Florida is of no significance in determining which law should govern the determination of this issue. The law of the *place of the wrong should of course determine whether or not a tort has in fact been committed*, but the distinct question of whether one spouse can maintain an action in tort against the other spouse is clearly a matter which should be governed by the law of the domicile of the persons involved. . . . Illinois has the predominant interest in the preservation of the relationship. 213 N.E.2d at 545. (Emphasis added.)

But for the emphasized portion, this sounds very much like the "governmental interest" aspect of the modern rule. In Graham v. General U. S. Grant Post No. 2665, V.F.W., 248 N.E.2d 657, 659 (Ill. 1969), the court expressed recognition of the modern rule and the criticism of the *lex loci delicti*, but found that the case did not after all involve a choice of law problem. The issue was whether to apply the Illinois Dram Shop Act to a case arising from an automobile accident in Wisconsin, where the drinking was done in Illinois. It held that the Act was not to be given extraterritorial effect.

Matters were further confused in Karczewski v. Baltimore & Ohio R.R., 274 F. Supp. 169 (N.D. Ill. 1967) and Manos v. Trans World Airlines, Inc., 295 F. Supp. 1170 (N.D. Ill. 1969).

In Karczewski, at 170, the court categorically stated: "Under Illinois conflict of laws principles, the law of the place of the tort must determine the substantive law in these circumstances."

The issue was whether a wife could sue in tort for loss of consortium with her husband. The train-auto accident occurred in Indiana, which prohibited such causes of action. The court held that Indiana substantive law must be applied. The court held, however, that law was in violation of the equal protection clause of the fourteenth amendment to the United States Constitution, since Indiana allowed a similar cause of action by a husband.

In Manos, the question is even more curious. The court, at 1173, stated: "On the issue of liability, both parties agree that Italian (site of the airplane accident) law should apply. This is clearly called for since the applicable Illinois conflict of laws principle points unambiguously to the law of the place of the tort in order to determine whether in fact a tort was committed."

However, the court refused to apply Italian law to the issue of damages for the death of Illinois domiciliaries. The court stated: "The predominant interests to be served on the issue of damages are those of the states containing the people or estates which will receive the recoverable damages, if any, for their injuries or their decedent's death."

Not everyone agrees on what to call this modern rule. Some courts and writers talk in terms of "contacts,"[73] while others characterize the rule as weighing governmental interests and relationships.[74] Be that as it may, the new rule, at the very least, commands litigants and courts to look at many other factors than just the fortuitous situs of the crash.[75]

In *Witherspoon v. Salm*[76] the court stated the rule to be applied in guest cases in these terms:

> We can see no merit in the establishment of a hierarchy of considerations . . . Neither should the mere numerical contacts with one State be balanced with those of another State. Each contact should be evaluated in light of collateral policy considerations and the particular State interests surrounding the rule of law.

Hence, the modern rule requires an answer to the question: which state has the greater interest in having its law applied?

Generally, the policy considerations are:

1. Predictability of results;
2. Maintenance of interstate and international order;
3. Simplification of the judicial task;
4. Advancement of the forum's governmental interests; and,
5. Application of the better rule.[77]

In litigation arising from aircraft accidents, the contacts with the alternative jurisdictions that should be so evaluated are:

1. Domicile of the host;[78]
2. Domicile of the guest;
3. Geographic base for the aircraft;
4. Domicile of the heirs of the guest;[79]
5. State where the liability insurance, if any, was purchased;[80]
6. State where the host-guest relationship was created;[81]
7. State where the host-guest relationship was intended to terminate;[82] and

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In both Karczewski and Manos the court relied upon Wartell.

Hence, the question arises, would Illinois apply its aviation guest statute to an accident in a non-guest-statute jurisdiction, where the host and guest are Illinois domiciliaries? The outcome would appear to hinge upon one's conceptual predilections about what guest statutes really are. If they are deemed to substantive definitions of when a tort has been committed, then Karczewski and Manos would suggest that the *lex* of the *loci delicti* would apply. If the statute is deemed to be a special limitation upon a particular relationship, i.e. host-guest, then Wartell would suggest that Illinois law, including her aviation guest statute, would apply. On the other hand by analogy to the Dram Shop Act in Graham, if the Illinois Legislature did not contemplate or intend the aviation guest statute to have extraterritorial effect, then it would not be applicable, even if Illinois damage law was applied.

[73] *See* Kilberg, *supra* note 54.

[74] *See* Kuchinic v. McCrory, 422 Pa. 620, 222 A.2d 897 (1966), where the Pennsylvania Supreme Court refused to apply the Georgia guest law to an aircraft accident in Georgia involving Pennsylvania domiciliaries and aircraft.

[75] *See* Annotation, *Modern Status of Rule That Substantive Rights of Parties to a Tort Action are Governed by the Law of the Place of the Wrong*, 29 A.L.R.3d 603 (1970).

[76] *Supra* note 68, at 124.

[77] Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579, 583 (1968); *see also* R. LEFLAR, AMERICAN CONFLICTS LAW 245 (1968).

[78] *See* Ehrenzweig, *Guest Statutes in the Conflict of Laws*, 69 YALE L.J. 595, 603 (1959).

[79] *See* Witherspoon, note 68, at 124-25.

[80] De Foor, *supra* note 71, at 109.

[81] *See* Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625, 627 (1967).

[82] *Id.*

8. State where the injured persons would be expected to return to for medical care and treatment.[83]

Where both the law of the accident situs and the forum contain diminished standards of care to a guest in aircraft operation, there is no true conflict. In such a situation the choice of the applicable standard would depend, of course, on the then prevalent conflicts of law rule in the forum.

The more difficult situation exists when either the law of the accident situs or some other jurisdiction that has any contact with the occurrence has a guest law, but the forum does not. There the court is squarely faced with a conflicts of law analysis. Little judicial reasoning is necessary if the forum adheres to *lex loci delicti.* The law of the fortuitous accident site is applied. But where the forum applies the modern rule, which is approaching the majority rule, the rationale becomes complex.

Where the host and guest have been domiciliaries of the forum, which has no guest law, the courts of late have refused to apply guest laws of foreign jurisdictions.[84] This is a relatively pure application of the contacts-governmental interest rule.

In *Kuchinic v. McCrory*[85] the highest court in Pennsylvania, a non-guest statute jurisdiction, refused to apply the Georgia diminished standard of care rule to wrongful death and survival actions arising from a light plane accident in Georgia. The host and guest were domiciliaries of the forum, the relationship originated in Pennsylvania and was to terminate there.

In recent years courts in states without guest statutes had refused to apply foreign guest laws for less mechanical and more realistic reasons. They have heavily relied upon the fifth policy consideration referred to above: i.e., application of the better rule of law.

As a general proposition, an eminent scholar in the field of conflicts of law has concisely expressed the pattern of opinion:

> Most courts have always been reluctant to apply a foreign guest statute to the personal injury claim of a forum citizen against his host-driver. Though paying lip service to the allegedly ancient *lex loci* rule, they have been inclined to give effect to their own common-law rule of full liability.[86]

In adhering to the "Better-Rule-of-Law" criteria, most courts have been refreshingly candid. The stage was set in *Mullane v. Stavola*:[87]

> Any test which gives little or no weight to a 'policy' test is at best artificial. When courts speak of 'grouping of contacts,' 'center of graviety,' 'paramount interest,' 'seat of the relationship' or 'fortuitous circumstances,' they are really attempting to arrive at a selective result. *One might with more reason say 'what law does justice require be applied?'* [Emphasis added.].

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[83] *See* Kopp v. Rechtzigel, 273 Minn. 441, 141 N.W.2d 526, 527-28 (1966).

[84] Witherspoon, *supra* note 68; Mullane v. Stavola, 101 N.J. Super. 184, 243 A.2d 842 (1968); Conklin, *supra* note 76; Mellk, *supra* note 81; Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967); Kopp, *supra* note 82; Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Kuchinic v. McCrory, 422 Pa. 620, 222 A.2d 897, 899 (1966); Castonzo v. General Cas. Co. of Wis., 251 F. Supp. 948 (W.D. Wis. 1966); Babcock v. Jackson, 12 N.Y. 473, 191 N.E.2d 279 (1963).

[85] *Supra* note 84, at Pa. 623-24.

[86] Ehrenzweig, *Foreign Guest Statutes and Forum Accidents,* 68 COLUM. L. REV. 49 (1968).

[87] *Supra* note 84, at A.2d 845.

It has been observed that the judicial choice of law process is not a mechanical selection of one or another jurisdiction without more.[88] To the contrary:

> Everyone knows that this is not what courts do nor what they should do. Judges know from the beginning between which rules of law, and not just what states, they are choosing . . .
> The inclination of any reasonable court will be to prefer rules of law which make good socio-economic sense for the time when the court speaks, whether they be its own or another state's rules.[89]

New Hampshire and Wisconsin have taken the more direct position and have unabashedly adopted the "Better-Rule-of-Law" rationale. In *Clark v. Clark*,[90] the New Hampshire Supreme Court refused to apply the Vermont automobile guest statute to an action between New Hampshire domiciliaries arising from a Vermont accident. The court stated:

> Finally, we conclude that our rule is preferrable to that of Vermont. The automobile guest statutes were enacted in about half the states, in the 1920's and early 1930's, as a result of vigorous pressures by skillful proponents. Legislative persuasion was largely in terms of guest relationships (hitch-hikers) and uninsured personal liabilities that are no longer characteristic of our automobile society. . . . The problems of automobile accident law then were not what they are today. . . . Though still on the books, they contradict the spirit of the times. . . . Unless other considerations demand it, we should not go out of our way to enforce such a law of another state as against the better law of our own state.[91]

Wisconsin jurisprudence is equally forthright:

> We also conclude that Wisconsin's law is the 'better law' to apply under the circumstances. We have . . . pointed out that the guest statutes are anachronistic vestiges of the early days of the development of the law-of-enterprise liability and do not reflect present-day socio-economic conditions. . . . We also conclude that such a law is bad law, for its application in those states where a legislature has put a guest law in effect results in a haven—a sanctuary —for those who wrongfully cause harm with impunity. We see only legal retrogression in extending the pernicious effects of such a law to Wisconsin.[92]

In *Heath v. Zellmer*,[93] the Wisconsin Supreme Court ruled:

> 'Guest laws' are not consistent with the present-day conditions in the field of motor-vehicle control and automobile-accident law. . . . We are satisfied, given the choice, as we are in this case, between the application of Wisconsin's rule of ordinary negligence and the Indiana (and Ohio) standard of 'wanton and wilful' conduct that Wisconsin's law is the 'better law.'

In view of *Conklin* and *Heath*, it would appear that the Wisconsin Court has overruled, *sub silentio*, *Gridley v. Cardenas*,[94] where it was held

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[88] Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1587-88 (1966).

[89] *Id.*

[90] 107 N.H. 351, 222 A.2d 205 (1966).

[91] *Id.* at A.2d 210.

[92] Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579, 586-87 (1968).

[93] 35 Wis. 2d 578, 151 N.W.2d 664, 676 (1967).

[94] 3 Wis. 2d 623, 89 N.W.2d 286 (1958).

that Florida substantive law applied to death actions arising from a light plane accident in Florida.

Although *Clark, Conklin* and *Heath* are clear adaptations of the "Better-Rule-of-Law" approach to choice of law questions, there still must be some contact between the forum and the occurrence. Professor Ehrenzweig has observed:[95]

> Suppose that a guest statute . . . has been recognized by the courts of a state as the mere product of a strong insurance lobby unconcerned with social realities and needs. Why should these courts not adopt a rule of choice enabling them to apply the better rule of either their own or another state, *provided that rule can reasonably be applied as that of the state of the defendant's or plaintiff's home or of some other contact relevant under the policy of the forum?* [Emphasis added.].

Finally, other jurisdictions have refused to apply foreign guest statutes after a comparative analysis of the policy considerations behind such statutes and the *lex fori.* As indicated above, the primary policy factors underlying guest statutes are (1) prevention of collusive law suits, and (2) prevention of ingratitude on the part of the guest.

As to policy (1) the United States District Court for the Western District of Wisconsin in *Castonzo v. General Cas. Co. of Wisconsin*[96] stated:

> Protection against collusive suits is of primary concern, perhaps exclusive concern, to the forum. Illinois may choose to protect its courts from collusive host-guest suits by applying the 'wilful and wanton' standard to the guest's claim. Wisconsin chooses not to employ this particular device to protect its courts from such collusive suits.

However, the court had some hesitation over the second policy consideration; i.e., prevention of ingratitude:

> Whether Illinois policy (2) is entitled to vindication in a Wisconsin court is much more puzzling. The policy of insulating hosts from claims by guest-passengers is itself puzzling. Is it purely a matter of morals or sentiment that generous people should not be penalized, or that one who obtains a free ride is entitled to nothing more?[97]

Disregarding this policy factor behind guest statutes has caused the concern of at least one legal writer:[98]

> The insurance collusion interest is clearly inapplicable, but the ingrate argument remains troublesome. To the extent that the latter supports the rationale behind guest statutes, the . . . court cannot lightly give it up, or resort to the 'better law' in multistate contact cases. It might even be contended that courts are bound to give expression and scope to outmoded or outlandish policy considerations, especially those cast in moral terms, in direct proportion to the degree of absurdity of these considerations. For by letting out-of-state ingrates recover while denying relief to domestic ingrates . . . the forum undercuts the credibility of its own rule.

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[95] Ehrenzweig, *A Counter-Revolution in Conflicts of Law?*, 80 HARV. L. REV. 377, 398 (1966).

[96] 251 F. Supp. 948, 952 (W.D. Wis. 1966).

[97] *Id.*

[98] Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice of Law Process*, 46 TEX. L. REV. 141, 165-66 (1967).

However, there appears to be a lighted path through the darkness of weighing policy considerations:

> Current social attitudes about host-guest statutes, especially in states that enacted them a long time ago, are relevant not only to judicial reinterpretation of the statutes but also to choice-of-law decisions concerning them, and may well influence a court in deciding which state has the most significant relationship to a complicated fact situation.[99]

Hence, it is suggested that the court look beyond the states policies that affected the legislative process at the time of enactment. The court should attempt to judge the current climate of social, economic and jurisprudential thought in the foreign state regarding its guest statute. The details of how this is to be done goes beyond the scope of this discourse.

Suffice it to say that New Jersey has not been troubled with the "ingrate" policy consideration:

> The strong New Jersey policy of allowing an injured guest to sue his host for negligence under such circumstances is not diminished merely because the accident occurred in another state. The desire of Ohio to prevent collusive suits *and suits by 'ungrateful' guests* applies to persons living in its state, defendants insuring motor vehicles there, and persons suing in its courts. Recovery for negligence in this action will not transgress these purposes in any way, will not frustrate the concerns which prompted the Ohio Legislature to enact a guest statute, and will not in the slightest impair traffic safety in Ohio.[100] [Emphasis added.].

In summary, it can be said that guest law cases have been in the eye of the hurricane of the revolution in conflict of laws rules. Where the forum presently retains the *lex loci delicti* doctrine and the aircraft accident occurs in one of the sixteen jurisdictions with aviation guest statutes or in Georgia,[101] then there will be applied the appropriate diminished standard of care to the guests', or his heirs', claims against the airman or his estate. If the accident occurred in Massachusetts, it would appear to be open to doubt as to whether the Massachusetts rule of gross negligence would be applied.[102] If the forum has rejected the *lex loci* rule, and has its own aviation guest statute, then it appears safe to say that if there are no contacts with a third jurisdiction that has no such guest law, then the forum will apply one or the other of the vaiation guest laws.

Very interesting questions would arise where the forum has adopted one or another version of the modern rule and has an aviation guest law, but the law of the situs does not. Would the forum give its guest law extraterritorial effect by choice of law reasoning? Similarly, what would or should the forum do when certain significant contacts point to a jurisdiction other than the forum or the accident situs that has an aviation guest statute? The recent California case, *Reich v. Purcell*[103] would suggest that the law of the third jurisdiction be given effect. There the Supreme

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[99] Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 307 (1966).
[100] Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625, 627 (1967).
[101] *See* Sammons v. Webb, *supra* note 19.
[102] For a discussion of the problem *see supra* note 20.
[103] 67 Cal. 2d 551, 432 P.2d 727 (1967).

Court refused to apply the Missouri monetary limit on wrongful death damages in an action arising from an accident in Missouri involving Ohio domiciliaries on their way to California. Neither Ohio nor California had monetary limits on death damages. Possibly *Reich* could be distinguished on the ground that money damages had a more immediate and direct impact upon the socio-economic concerns of the third jurisdiction than would extra-territorial application of its diminished standard of conduct in aircraft operation in or over another state.

So much for these general and correlated problems created by aviation guest laws. Let us now open Pandora's Box and take a look at the meaning of the particular provisions of these laws.

## IV. STATUS

### A. *Introduction*

The threshold issue of fact in each aviation guest case is whether the rider is a "guest" within the purview of the applicable law. General statements of the rules are deceiving. Each factual circumstance must be treated on its own terms. Be that as it may, if there is to be predictability in this area of tort law we must strive to derive lessons from past litigation and judicial construction of guest laws. Once again it will be necessary to look to the experiences in the field of automobile guest law.

The issues regarding the status of the rider in an aircraft are:

1. Was the host-guest relationship properly created?
2. Did the rider confer upon the owner or pilot a sufficient tangible benefit so as to render himself a "passenger" instead of a "guest?"[104]
3. Was the host-guest relationship terminated before the aircraft accident?

### B. *"Guest"*

Each jurisdiction with an aviation guest law has many times tried to define the term "guest." The Restatement, Second, *Torts*[105] has attempted a general definition:

> The word 'guest' is used to denote one whom the owner or possessor of a motor car or other vehicle invites or permits to ride with him as a gratuity, that is, without any financial return except such slight benefits as it is customary to extend as part of the courtesies of the road.

This conforms with the common-law definition applied in Georgia.[106] In each of the sixteen jurisdictions with aviation guest laws created by statute there is some statutory language that attempts to define "guest." All states agree that where a rider fails to render unto the owner or operator

[104] Terminology becomes very important at this stage of a guest case. Hence, for clarification the following impromptu definitions should be adopted: A "rider" is anyone in the aircraft, who is not operating it and who may be either a "guest" or "passenger." A "guest" is a rider that does not meet the standards of the applicable guest law to become a "passenger," and must, therefore, show a greater degree of culpability on the part of the host than ordinary negligence. A "passenger" is a "rider" who has, as of the time of the accident, shown that the particular aviation guest law is not applicable to the litigation. Hence, he is a "rider" to whom the host owes the common-law duty of ordinary care.

[105] § 490, comment a.

[106] Nash v. Reed, 81 Ga. App. 473, 59 S.E.2d 259, 261 (1950).

of the aircraft any "payment" or "compensation," then the rider may be a "guest." Unfortunately, there is little consistency or harmony in the various aviation guest law jurisdictions as to what constitutes "payment" or "compensation." That problem will be discussed shortly.

There is agreement that the plaintiff has the burden of persuasion and proof regarding his status, "guest" or "passenger," in the aircraft at the time of the accident.[107]

The first phase of this aspect of aviation guest cases is to determine whether, in fact, the host-guest relationship was ever created prior to the aircraft accident.

### C. *Creation of Host-Guest Relationship*

At the outset it should be noted that whether or not there is a host-guest relationship may depend upon factors other than whether the rider conferred "payment" or "compensation" upon the pilot or owner. The Oregon Supreme Court stated the rule in these concise terms:[108]

> . . . the absence of a substantial benefit to the driver is not the sole criterion to be used in determining the host-guest relationship under the statute . . . A person is not a guest unless he is transported without payment *and* he is also a guest in other respects.

Later we'll look into what "payment" means. For now, let us consider what "other respects" the court was referring to.

All aviation guest statutes utilize the term "guest." Some courts have construed that term to mean that there must be someone with the legal capacity to extend an invitation to ride in the vehicle, auto or aircraft. In *Spring v. Liles*[109] the Oregon court stated:

> The relation of host and guest presupposes (1) that the host has a right to extend hospitality to the guest at the particular place where he is invited to be present, and (2) that an invitation, expressed or implied, has been given.

Indiana[110] has also so ruled and went one step further:

> . . . all of these definitions contemplate both an invitation on the part of the owner *and an acceptance on the part of the guest of such invitation.* . . .

The Nebraska[111] aviation guest statute expressly defines "guest" as "a person who accepts a ride. . . ." California,[112] Georgia,[113] Michigan,[114] and Oregon[115] also require that the host's invitation be accepted.

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[107] Whittemore v. Lockheed Aircraft Corp., 65 Cal. App. 2d 737, 740, 151 P.2d 670 (1944); De Joseph v. Faraone, 254 A.2d 257, 260 (Del. 1969); Rosenbaum v. Raskin, 103 Ill. App. 2d 469, 243 N.E.2d 616, 621 (1968); Birmelin v. Gist, 162 Ohio St. 98, 120 N.E.2d 711 (1954); Senechal v. Bauman, 232 Ore. 217, 375 P.2d 60, 63 (1962); Guyton v. Guyton, 244 S.C. 357, 137 S.E.2d 273 (1964).

[108] Spring v. Liles, 236 Ore. 140, 387 P.2d 578, 580 (1963).

[109] *Id.* at 580-81.

[110] Fuller v. Thrun, 109 Ind. App. 407, 31 N.E.2d 670, 672 (1941).

[111] *See* Appendix.

[112] Rocha v. Hulen, 6 Cal. App. 2d 245, 44 P.2d 478 (1935).

[113] Wood v. Morris, 109 Ga. App. 148, 135 S.E.2d 484, 486 (1964).

[114] Burhans v. Witbeck, 375 Mich. 253, 134 N.W.2d 225 (1965).

[115] Senechal, *supra* note 107, at P.2d 61; Kudrna v. Adamski, 188 Ore. 396, 399, 216 P.2d 262 (1950).

Ohio[116] has expressly rejected the consensual theory of the host-guest relationship. Hence, there would appear to be no reason to show that the driver had the capacity to extend the invitation and that the rider had the capacity to accept. Arkansas,[117] Delaware,[118] Idaho,[119] Illinois,[120] South Dakota,[121] and Utah[122] appear to impliedly reject the consensual theory.

Hence, in those jurisdictions that have adopted the consensual theory of the host-guest relationship, the first issue is whether the defendant had the legal standing to extend an invitation to ride in the aircraft. This issue usually arises when the operator is not the legal or registered owner of the vehicle. In this instance, two questions arise: first, can an owner-rider become a "guest" of the non-owner-operator of his aircraft?[123] Secondly, does the non-owner-operator of the aircraft have the capacity to extend an invitation to a non-owner third party?

In regard to a riding owner the hospitality usually flows from the owner to the operator. Hence, the weight of authority in general,[124] and particularly in those jurisdictions with aviation guest laws,[125] is that an owner may not be a guest in his own vehicle.

Ohio[126] and South Dakota[127] appear to follow a variant rule. There a riding owner is on no different ground than any other rider. He would be required to prove that he was not a "guest."

Parenthetically, it should be noted that Idaho,[128] Illinois,[129] Michigan[130] and North Dakota[131] have expressly held that an owner who temporarily turns control of the vehicle to a "guest" does not automatically terminate the host-guest relationship. The owner remains the host, and the guest in control owes him the duty of ordinary care.

The second issue; i.e., whether a non-owner operator has the capacity to extend an invitation to a non-owner, creates a more intriguing question.

[116] Kemp v. Parmley, 16 Ohio St. 2d 3, 241 N.E.2d 169 (1968); Lombardo v. DeShance, 167 Ohio St. 431, 149 N.E.2d 914, 918 (1958).

[117] Tilghman v. Rightor, 211 Ark. 229, 199 S.W.2d 943, 945 (1947).

[118] Lynott v. Sells, 52 Del. 385, 158 A.2d 583, 585 (1958).

[119] Petersen v. Parry, 92 Idaho 647, 448 P.2d 653 (1968).

[120] Roesnbaum, *supra* note 107.

[121] Mitzel v. Hauck, 78 S.D. 543, 105 N.W.2d 378 (1960).

[122] Favatella v. Poulsen, 17 Utah 2d 24, 403 P.2d 918 (1965).

[123] *See* Comment, *Can a Person Be a 'Guest' in his own Car?*, 38 U. COLO. L. REV. 346 (1966); Note, 9 S.D. L. REV. 204 (1964); Comment, 17 Sw. L.J. 298 (1963); Note, 32 S. CAL. L. REV. 93 (1958); Annotation, *Guest Statute as Applicable to Member of Family Riding in Car Driven by Another Member*, 2 A.L.R.2d 932 (1948); Annotation, *Vehicle Owner or His Agent Having General Right of Possession and Control as Guest of Driver Within Automobile Guest Statute or Similar Rule*, 65 A.L.R.2d 312 (1959); Annotation, *Burden of Pleading and Proving Guest Status, or Absence Thereof, under Automobile Guest Statute*, 24 A.L.R.3d 1400 (1969).

[124] *See* Annotation, *Vehicle Owner or His Agent Having General Right of Possession and Control as Guest of Driver Within Automobile Guest Sttatute or Similar Rule*, 65 A.L.R.2d 312 (1959).

[125] Wilson v. Workman, 192 F. Supp. 852, 854 (D. Del. 1961); Peterson v. Winn, 84 Idaho 523, 373 P.2d 925, 928 (1928); Summers v. Summers, 40 Ill. 2d 338, 239 N.E.2d 795 (1968); Baldwin v. Hill, 315 F.2d 738, 742 (6th Cir. 1963) (applying Michigan law); *see also* Froemke v. Hauff, 147 N.W.2d 390, 402-03 (N.D. 1966).

[126] Thomas v. Hurron, 20 Ohio St. 62, 253 N.E.2d 772, 774 (1969); Henline v. Wilson, 111 Ohio App. 515, 174 N.E.2d 122 (1960).

[127] Schlim v. Gau, 8 S.D. 403, 125 N.W.2d 174, 178 (1963); Phelps v. Benson, 252 Minn. 457, 469, 90 N.W.2d 533 (1958) (applying South Dakota's automobile guest statute).

[128] Peterson, *supra* note 125.

[129] Summers, *supra* note 125.

[130] Baldwin, *supra* note 125.

[131] Froemke, *supra* note 125.

California[132] and Michigan[133] have faced this question in regard to their automobile guest statutes. The California court held that:

> If one is to be a guest in a vehicle and 'accept' a ride therein there must be a host who can extend an invitation for the ride. The evidence here establishes that the defendant could not and did not achieve the status of a host. He did not own the vehicle. He did not borrow the car or rent it, and did not have charge of it. He did not propose the trip. He was in no position to extend an invitation to anyone to ride with him.[134]

There the rider was the wife of the owner and the defendant was traveling and driving at the request of the plaintiff.

In *Baldwin v. Hill*[134a] the United States Circuit Court of Appeals for the Sixth Circuit reached a similar result. There the plaintiff was the daughter of the owner, who was not in the vehicle, and invited the defendant to drive. The court held that as a matter of law the plaintiff was the "host" and not the operator-defendant.

The second half of the consensual theory of the host-guest relationship requires a showing that the rider had the capacity to accept the invitation and did in fact make such an acceptance. The more frequent context in which this question emerges is where the rider is a minor.[135] Once again, there is lack of uniformity among those states having aviation guest laws. Those states rejecting the consensual theory hold that the legal incapacity of the rider, by reason of his minority, will not, as a matter of law, preclude application of the guest statute. Ohio has gone so far as to hold that the incapacity of the rider to accept the invitation, which resulted from his intoxication, would not prevent application of the automobile guest statute.[136]

California,[137] Georgia,[138] Indiana,[139] Michigan[140] and Oregon[141] have squarely held that a minor of tender years does not have the legal capacity to accept an invitation to ride from a bonafide host. In Michigan a child under seven is presumed legally incompetent and cannot consent to any rider.[142] However, a child over seven does not as a matter of law possess insufficient ability, intelligence or experience to knowingly accept a ride.[143] In *Wood v. Morris*[144] a Georgia court went one step further and held that

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[132] Whitehill v. Strickland, 256 Cal. App. 2d 837, 840-41, 64 Cal. Rptr. 584 (1967).

[133] Baldwin, *supra* note 125.

[134] Whitehill, *supra* note 132, at Cal. App. 2d 840.

[134a] Baldwin, *supra* note 125.

[135] *See* Note, 46 VA. L. REV. 1615, 1617-18 (1960); Comment, 8 DRAKE L. REV. 156 (1958); Note, 7 KAN. L. REV. 204, 205 (1958); Comment, *The Ohio Guest Statute*, 10 U. CIN. L. REV. 289, 298-99 (1936); Annotation, *Infant as Guest Within Automobile Guest Statutes*, 16 A.L.R.2d 1304 (1951).

[136] Lombardo, *supra* note 116; *see* Annotation, *Intoxication, Unconsciousness, or Mental Incompetency of Person as Affecting his Status as Guest Within Automobile Guest Statute or Similar Common-Law Rule*, 66 A.L.R.2d 1319 (1959).

[137] Rocha, *supra* note 112.

[138] Wood, *supra* note 113.

[139] Fuller, *supra* note 110.

[140] Kelly v. Bywater, 18 Mich. App. 238, 171 N.W.2d 58 (1969).

[141] Kudrna, *supra* note 115.

[142] Burhans, *supra* note 114.

[143] Kelly, *supra* note 140, at N.W.2d 59.

[144] *Supra* note 113, at S.E.2d 484.

an eleven year old girl was "legally incapable of giving the necessary consent and accepting the invitation. . . ."

California,[145] Georgia,[146] Indiana[147] and Oregon[148] have modified their infant-capacity rule. Where the infant's legal guardian, parent or otherwise, has accepted the host's invitation, either expressly or impliedly by also participating in the ride, then that act of violation will be imputed to the infant and the child may become a "guest."

An interesting hybrid of the consensual theory has occurred in Oregon. In *Spring v. Liles*,[149] the plaintiff was required to ride in the defendant's car because of a problem that arose from their common employment. There was no extension of hospitality in the nature of a friendly invitation to take a ride. The court held that a host-guest relationship was never created:

> Even in the absence of a benefit to the defendant, the plaintiff is a passenger (as distinguished from a guest) if his presence in the vehicle does not arise primarily from the hospitality of the defendant. . . . Plaintiff and defendant were thrown together because a problem arose incident to their common employment. *We do not believe that this is the type of motivation bringing a driver and passenger together which characterizes the creation of the host-guest relationship.* [Emphasis added.].

Finally, the Colorado Supreme Court has rendered an opinion that is closely related to the matter of consensual acceptance of a host's invitation that may find important applications in aviation guest causes. In *Coffman v. Godsoe*[150] the court clearly adopted the consensual theory of the host-guest relationship in these terms:

> . . . the relationship of driver and guest is consensual in its nature and involves conscious acceptance by the guest of the status or relationship with its attendant hazards.[151]

The court pointed out that "one does not stand in the guest relationship where the circumstances of passenger relationship arises involuntarily or forcibly."[152] The issue before the court was:

> Whether misrepresentations, which operate as an inducement to one to become a passenger, produce a like legal effect as that which follows from the exercise of force or the existence of incapacity.[153]

Therein the defendant made false and fraudulent statements as to his authority and ability to drive the vehicle. The court ruled that plaintiff's acceptance was based on these misrepresentations The court held that:

> Involuntary acceptance of transportation operates to avoid the element of consent which is essential to existence of the guest status.[154]

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[145] Buckner v. Vetterick, 124 Cal. App. 2d 417, 269 P.2d 67 (1954).
[146] Chancey v. Cobb, 102 Ga. App. 636, 117 S.E.2d 189, 192-93 (1960).
[147] Whitfield v. Bruegel, 134 Ind. App. 636, 190 N.E.2d 670, 672 (1963).
[148] Welker v. Sorenson, 209 Ore. 402, 306 P.2d 737 (1957).
[149] *Supra* note 108, at P.2d 582-83.
[150] 142 Colo. 575, 351 P.2d 808 (1960); *see also* Note, 46 VA. L. REV. 1615 (1960).
[151] *Supra* note 150, at P.2d 812.
[152] *Id.*
[153] *Id.*
[154] *Id.* at P.2d 813.

The analogy is clear. By application of the courts rationale in *Coffman*, it can be argued that where a rider in an aircraft is induced into accepting the pilot's invitation by misrepresentations made by the pilot about his training and ability or the flight conditions to be encountered, then the plaintiff should be allowed to obviate that acceptance and recover without regard to any applicable aviation guest law. In essence, the rider was involuntarily thrust into the situation by the misconduct of the pilot, who should not be allowed to profit from his initial misdeeds.[155]

It is submitted that one of the considerations underlying the consensual theory's rationale is that before a rider will be deemed to have waived his common-law right to be free from redress of an injury caused by lack of ordinary care, he must show that he had sufficient capacity to appreciate the dangers and hazards incident to operation of such vehicles in a careless manner. In *Coffman* the court recognized this principle:

> Recovery for injuries caused by simple negligence is denied a guest because of his nonpaying status. It is said that he is the recipient of a gratuitous benefit conferred on him by the owner or operator of the vehicle. By reason of this the statute requires the guest to accept the hazards created by the ordinary negligence of the host. By agreeing to accept the free transportation, he is to waive his right to recover for injuries occasioned by the simple negligence of the driver.[156]

If in fact it is waiver that we are talking about, then why should the plaintiff not be allowed to show that by reason of his lack of experience with and knowledge of aircraft operations, he was totally unable to know, understand or appreciate the hazards to his personal security of careless aircraft operation? It is axiomatic in the law that one cannot waive that which he does not know. With the intense modern utilization of automobiles, it is easy to imply about their hazards, but such is not the case with aircraft. Certainly if the pilot makes any misrepresentations about "safe" flying, and the unknowing rider is induced to accept the invitation to ride, it would seem fair and just to vitiate the acceptance and let the rider recover on the basis of the airman's simple negligence.

Let us turn now to one of the aspects of the host-guest relationship that has generated a great deal of the litigation heretofore; to wit, has the rider rendered unto the operator or owner a "payment" or "compensation" for the ride or the transportation?

### D. *"Payment" or "Compensation"*

Heretofore, a "guest" was defined in part as one who rides in a vehicle gratuitously. Conversely, if the rider confers upon the pilot or owner a "payment" or "compensation" for the ride, he is freed from his guest status and the aircraft operator owes him the common-law duty of ordinary care under the circumstances. Where this demarcation is in any given case is an issue *sui generis* to that suit. Here is where the scholarly generalizations and definitions that have survived fifty-three years of experience

[155] *See* Weber, *Guest Statutes*, 11 CIN. L. REV. 24, 45 (1937).
[156] Coffman, *supra* note 150, at P.2d 811-12.

with guest laws simply break down when applied to particular factual situations.

Although there are more aviation guest cases[157] dealing with this issue than others, it is still helpful to look at judicial determinations under the automobile guest laws. In all jurisdictions, save Illinois, the statutory or decisional basis for "payment" or "compensation" is identical for both the automobile and aviation guest laws. Illinois statutorially prohibits suits between joint venturers while riding in automobiles, but has no similar provision in the aviation guest statute. Nor does there appear to be any unique or unusual aspect of air travel that would suggest different rules of law regarding what is a sufficient "payment" or "compensation" under the guest laws. Litigation involving this issue has been extensive.[158]

It is uniformly held that "payment" or "compensation" means conferring upon the operator or owner some benefit.[159] In Michigan[160] the courts look to the "pecuniary" nature of the "benefit." The majority of the jurisdictions with aviation guest statutes define "benefit" in terms of being "tangible" or "substantial."[161] In *Whittemore v. Lockheed Aircraft Corp.*,[162] the Court summarized the "benefit" concept very concisely:

> This compensation may consist of any benefit of a tangible nature received by the (operator) as a consideration for the ride. Obviously if the rider parts with nothing but goes along solely for his own pleasure or in pursuit of his own business and not in aid of the business of the operator or the common-business of the two, he is a mere guest. Where the claimed compensation consists only of some business advantage or benefit which will accrue to the operator, in order to take one out of the guest class, it must be of a practical and tangible nature identified definitely with the business purposes of the operator of the vehicle.

The courts, particularly in California[163] and Oregon,[164] have been very liberal in interpreting the concept of "benefit" in favor of the rider. The Oregon Supreme Court went so far as to hold that the "payment" need not be a material benefit to the operator.[165] The legislature responded by

[157] Doyle v. Hamren, 246 Cal. App. 2d 733, 55 Cal. Rptr. 84 (1966); Stiles v. American Trust Co., 137 Cal. App. 2d 472, 290 P.2d 614 (1955); Halbert v. Berlinger, 127 Cal. App. 2d 6, 273 P.2d 274 (1954); Whittemore v. Lockheed Aircraft Corp., 65 Cal. App. 2d 737, 151 P.2d 670 (1944); Marshall v. First American Nat. Bank, 91 Ill. App. 2d 47, 233 N.E.2d 430 (1968); United States v. Alexander, 234 F.2d 861 (4th Cir. 1956), *cert. denied*, 352 U.S. 892 (applying Indiana law); Lightenburger v. Gordon, 81 Nev. 553, 407 P.2d 728 (1965); DeFoor v. Lematta, 249 Ore. 116, 437 P.2d 107 (1968); Middleton v. Cox, ___ Utah 2d ___, ___ P.2d ___, 11 Av. Cas. 17,430 (February 5, 1970).

[158] *See* 20 A.L.R. 1014 (1922); 26 A.L.R. 1425 (1923); 40 A.L.R. 1338 (1926); 47 A.L.R. 327 (1927); 51 A.L.R. 581 (1927); 61 A.L.R. 1252 (1929); 65 A.L.R. 952 (1930); 146 A.L.R. 640 (1943); 146 A.L.R. 682 (1943); 10 A.L.R.2d 1351 (1950).

[159] Hart v. Wielt, 4 Cal. App. 3d 224, 235, ___ Cal. Rptr. ___ (1970); Whittemore v. Lockheed Aircraft Corp., 51 Cal. App. 2d 605, 609, 125 P.2d 531 (1942); Note, 3 WYO. L.J. 225, 226 (1949); Note, *Guest and Secondary Liabilities in Private Aviation*, 30 IOWA L. REV. 442, 446 (1945).

[160] Shumaker v. Kline, 333 Mich. 346, 53 N.W.2d 295 (1952).

[161] Whittemore, *supra* note 159; Born v. Matzner's Estate, 159 Neb. 169, 65 N.W.2d 593 (1954).

[162] *Id.*

[163] *See* Hardman, *Aviation Guest Statutes*, INS. L.J. 561, 565 (1962); Comment, 26 CAL. L. REV. 251, 252 (1938).

[164] Skow v. Skulps, 224 Ore. 548, 356 P.2d 521 (1960); Johnson v. Kolovos, 224 Ore. 266, 355 P.2d 1115 (1960).

[165] *See* Skow and Johnson, *supra* note 164.

amending the Oregon guest statute. In 1961 the following definition of "payment" was added:

> 'Payment' means a substantial benefit in a material or business sense conferred upon the owner or operator. . . .

The "benefit" need not be a legally enforceable agreement.[166]

As indicated in the Oregon statute, the benefit must flow in favor of the operator, his agent or principal or the owner.[167] Where the benefit favors another rider, not the operator, there is no payment and the guest statute applies.[168] On the other hand, the benefit to the operator or owner need not come directly from the rider.[169] It may come from a third party to the rider.

The "benefit" need not be exclusively in money or any other concrete manifestation of value.[170] Clearly it can be in the form of services rendered or to be rendered by the rider or someone else so as to benefit the operator.[171] However, where the operator does not request the rider's services, and the rider goes along and voluntarily performs such services, it has been held that the rider was a guest.[172] Whatever the nature of the benefit, it is agreed that it may be realized after commencement of the ride or transportation.[173] However, where the realization is prospective it must be more than a mere possibility.[174] There is also agreement among the aviation guest law jurisdictions that the benefit conferred, or to be conferred, upon the operator must be a motivating influence upon the operator for taking along the rider.[175] Oregon as gone so far as to amend its statute to require that the payment be "a substantial motivating factor for the transportation."

These general rules of law have been applied to aviation accident litigation. In *De Foor v. Lematta*,[176] the plaintiff was held to be a passenger as a matter of law where he had bought a helicopter through the defendant, who was to return to Oregon with the plaintiff after delivery in Culver City, California. The plaintiff paid all the travel costs. The accident occurred in California during a side trip to the plaintiff's ranch. It is interesting to note that the plaintiff was the president of the corporate ow the helicopter at the time of the accident. As a result of the court's ruling that the

[166] Haney v. Takamura, 2 Cal. App. 2d 1, 37 P.2d 170 (1934); Friedhoff v. Engberg, 149 N.W.2d 759 (S.D. 1967); Note, 4 HOUSTON L. REV. 690, 693 (1967).

[167] Halbert, *supra* note 157; Connett v. Wingett, 303 Ill. App. 227, 25 N.E.2d 116 (1940); Shumaker, *supra* note 160; Born, *supra* note 161; Voelkl v. Latin, 58 Ohio App. 245, 16 N.E.2d 519 (1938).

[168] Connett, *supra* note 167.

[169] Thompson v. Lacey, 42 Cal. 2d 443, 267 P.2d 1 (1954); Born, *supra* note 161; Sprenger v. Braker, 49 N.E.2d 958 (Ohio App. 1942).

[170] Ahlgren v. Ahlgren, 185 Cal. App. 2d 216, 220, 8 Cal. Rptr. 218 (1960); Cluts v. Peterson, 113 N.W.2d 273 (S.D. 1962).

[171] Kruzie v. Sanders, 23 Cal. 2d 237, 143 P.2d 704 (1943); Lerma v. Flores, 16 Cal. App. 2d 1928, 60 P.2d 546 (1936); Voelkl, *supra* note 167.

[172] Yates v. J.H. Krumlinde & Co., 22 Cal. App. 2d 387, 71 P.2d 298 (1937).

[173] Doyle, *supra* note 157; Liberty Mut. Ins. Co. v. Stitzle, 41 N.E.2d 133 (Ind. 1942).

[174] U.S. v. Alexander, *supra* note 157, at 867.

[175] Whittemore, *supra* note 159; Dirksmeyer v. Barnes, 2 Ill. App. 2d 496, 119 N.E.2d 813 (1954); Dick v. Carey, 408 F.2d 555, 556 (7th Cir. 1969) (applying Indiana law); Lightenburger, *supra* note 157, at Nev. 567; Born, *supra* note 161; Gunderson v. Sopiwnik, 66 N.W.2d 510 (S.D. 1954); Smith v. Franklin, 14 Utah 2d 16, 376 P.2d 541 (1962).

[176] *Supra* note 157.

plaintiff-rider was a passenger, it was unnecessary for the court to consider whether the non-owner-pilot had the capacity to become a host. When we consider that as part of the purchase, the defendant obligated himself to teach the plaintiff how to operate the helicopter, it is clear that the defendant was receiving a direct pecuniary benefit from the plaintiff in exchange for the ride; i.e., earnings from the sale.

*Doyle v. Hamren*[177] involved the crash of Piper Comanche into San Francisco Bay on the return leg to Sacramento from a business trip to San Francisco. The purpose of the trip was to make arrangements for a business venture. The pilot was to be manager. The plaintiff's dectdent was one of the members of the joint enterprise. Further, the trip was necessary to the accomplishment of the business venture. The court ruled that the plaintiff's decedent was a "passenger," and not a "guest," as a matter of law.[178] This is a good example of a prospective benefit. Apparently the court was persuaded that the probability of the fulfillment of the proposed business venture was more than a mere possibility.

Similarly, in *Halbert v. Berlinger*[179] the court held that the evidence was sufficient for the jury to conclude that the riders were "passengers" and not "guests," where the corporate owner of the aircraft, which was being piloted by the president of the corporation, expected to receive a benefit from the flight. The rider and another had needed certain construction work performed. The matter was discussed with the pilot, who was in the construction business and who suggested that he fly the rider to inspect the job sites. After that the pilot suggested that they go hunting. It was during the hunting portion of the trip that the accident occurred. The probability of fulfillment of the prospective benefit here was much less than in the *Doyle* case. Realistically, that is probably why the issue was couched in terms of substantial evidence to support the jury's verdict for the plaintiffs.

*Whitmore v. Lockheed Aircraft Corp.*[180] presents another case involving the purchase and delivery of an aircraft. There the plaintiff's decedent was to accept delivery of the aircraft in Las Vegas, Nevada for his employer, Northwest Airlines, Inc. Instead of going directly to Las Vegas, he went to the defendant's plant in Burbank, California. He was known to have accepted delivery of the defendant's aircraft in the past. It was admitted that neither the plaintiff's decedent nor his employer made any special cash payment for the ride from Burbank to Las Vegas. The court reasoned thusly:

> . . . defendant must be deemed to have received compensation if he was taken along because it was considered by defendant to be to its business advantage that he be taken to Las Vegas in the plane.[181]

The court observed that it was obviously to the defendant's advantage

[177] *Id.*
[178] *Id.* at Cal. App. 2d 739.
[179] *Supra* note 157.
[180] *Supra* notes 157 and 159.
[181] *Supra* note 159.

to get the plaintiff's decedent to Las Vegas so he could take delivery of the aircraft. In addition, Lockheed was interested in promoting the goodwill and patronage of Northwest Airlines. Hence, carriage of the plaintiff's decedant was conducive to the maintenance of that beneficial relationship. The court's position is a frank recognition of business realities. It is submitted that the strongest rationale for the court's ruling is the preservation of goodwill between the defendant and Northwest Airlines. It should be noted that the recipient of the benefit was not the pilot, but his corporate employer. Likewise, it is noteworthy that the giver of the benefit was not the plaintiff's decedent, but his employer.

A clear example of a prospective benefit is the demonstration drive or flight by the seller or manufacturer. Delaware, Michigan, Nebraska, North Dakota, and Oregon expressly exclude demonstration flights from the guest statute. California[182] cases have held such demonstration rides to be a sufficient benefit so as to preclude application of the guest statute without regard to whether the sale was actually consummated.

There are, however, some aviation guest cases where the court failed to find any benefit and, thus, held the guest statutes applicable. *Lightenburger v. Gordon*[183] involved the crash of a Cessna 310 during approach into Los Angeles International Airport. The court looked to California law and engrafted it onto that of Nevada, and considered that Nevada law applied, since the host-guest relationship originated in Nevada. The rider was an employee of a third party that sought to make sales to the owner of the aircraft. The seller had arranged for a commercial flight to Los Angeles to carry out the transaction. Apparently upon learning of these arrangements, Gordon, president of the owner of the aircraft, persuaded Lightenburger to fly to Los Angeles in his aircraft. The court recognized the rule that a benefit may be sufficient although prospective.[184] However, it held that any benefits to be realized by Gordon and his corporation would have been realized without regard to the use of the corporate aircraft. The business activity to be accomplished in Los Angeles had already been arranged. The services of Lightenburger had already been committed. All the court could find was a mere convenience to Gordon, which did not rise to the dignity of a "benefit." One lesson to be drawn from *Litchenburger* is that any benefit flowing to the pilot or owner must be related to the particular flight.

Two aviation guest statute cases illustrate one aspect of the concept of "benefit" that is unrelated to commercial dealings. In *Stiles v. American Trust Co.*,[185] the pilot had a habit of flying into a rural northern California community in which he owned a ranch. One of the plaintiff's friends agreed the ride to the airport, they came upon the plaintiff walking along tht road. The plaintiff's friend asked the pilot if the plaintiff could go along. The pilot agreed. The court held that any benefit conferred upon the pilot by

[182] Riley v. Berkeley Motors, Inc., 1 Cal. App. 2d 217, 36 P.2d 398 (1934), Crawford v. Foster, 110 Cal. App. 81, 293 P. 841 (1930).

[183] *Supra* note 157.

[184] Lightenburger, *supra* note 157, at Nev. 568.

[185] *Supra* note 157.

reason of the services of the plaintiff's friend would not be deemed to have been rendered in behalf of the plaintiff. The pilot had no idea that when he agreed to take the friend up, that the plaintiff would be included. The use of the car was in no way predicated upon the pilot's taking the plaintiff for a ride. His status as a rider was totally unforeseeable by the pilot when he struck his bargain. *Stiles* suggests a very important limitation upon the rule concerning a benefit supplied by a third party; to wit, must the existence of the particular rider be reasonably forseeable at the time? Also, it is an example of an anomaly created by aviation guest statutes—one rider may be a "guest" while his companion in the aircraft may be a "passenger."

The second case, *Marshall v. First American Nat'l Bank*,[186] is useful for illustrative purposes only, since the court came to no definitive decision on the "benefit" issue. The plaintiff had previously left his airplane in Illinois and had driven back to Tennessee because of bad weather. Apparently he made a deal with the pilot to fly him back to pick up his aircraft. During this flight the accident occurred. The pilot was killed, but the plaintiff survived. His testimony regarding the prearranged agreement relating to expenses with the pilot was equivocal, but he did testify without hesitancy that the pilot welcomed the opportunity "to get some flying time in his airplane on cross-country flights, as he would like to gain some instrument time."[187] Query: would the plaintiff's offer, without regard to the amount to be paid, which gave the pilot an otherwise unavailable opportunity to get flight time and improve his skills, be a sufficient "benefit" to withdraw the plaintiff from the guest status?

The only hint of the court's unexpressed opinion comes from the procedural context of the case. The plaintiff had appealed from an adverse judgment entered after a jury verdict for the defendant. The judgment was reversed because of evidentiary errors which were sufficiently prejudicial, and remanded for new trial. However, the plaintiff had pleaded only simple negligence and "compensation." Hence, if there was no "benefit" shown in the record before the court, then it would have been relatively futile to remand for new trial. The point was not discussed in the opinion.

Finally, there have been two reported cases involving activities by the Civil Air Patrol (CAP). In *United States v. Alexander*,[188] the issue concerned prospective benefits to be conferred upon the CAP by the rider. The CAP had offered a courtesy ride to a professional golfer, who it hoped would participate in a benefit golf tournament to raise funds for the Patrol. The court ruled that he was a "guest." The court's reasoning was thus:

> The mere possibility that the flight would result in material gain to the CAP in connection with an interprise which was still in the tentative stage was too insubstantial to alter the status of Alexander as a non-paying guest.[189]

The second CAP case has more significant ramifications. On 5 February

[186] *Id.*
[187] *Supra* note 157, at Ill. App. 2d 50.
[188] *Supra* note 157.
[189] *Supra* note 157, at 867.

1970 the Utah Supreme Court rendered its opinion in *Middleton v. Cox*.[190] An accident occurred during a volunteer search and rescue mission being conducted by the CAP for a lost aircraft. Cox piloted an aircraft involved in the search. He needed an observer to comply with the pertinent regulations, and Middleton volunteered to go with him. The majority of the court held, with virtually no discussion, that the rider was a "guest." In a concurring opinion by one justice and a dissenting opinion by another, the holding of the majority on this point was hotly contested. The former argued that the relationship between Cox and Middleton was more like "a joint enterprise to perform a service for the benefit of someone else and at the request of third parties."[191] The latter adopted the consensual theory of the host-guest relationship and argued that unless there was a "giving" of an invitation for the ride, then the host-guest relationship was never created, without regard to "payment" or "compensation." In the alternative the dissenter argued that Cox did receive a sufficient benefit, albeit from a third party; i.e., the CAP. Cox owned the plane being used and he was being reimbursed by the CAP for expenses incurred in connection with the flight. Without Middleton or someone else as observer, Cox would not have been able to participate in the search according to the applicable regulations. Query: did the presence of the observer in his aircraft permit Cox the personal enjoyment of participating in the humane mission? If so, cannot such personal gratification constitute a sufficient "benefit?" It is submitted that too many questions were left unresolved by the opinion of the majority.

The *Middleton* case introduces three closely related aspects of the concept of "benefit." Most directly, it brings forth the question of the status of the parties when the purpose of the ride or transportation is the promotion of the interests of a volunteer organization to which the operator and rider both belong. Secondly, it impliedly raises the matter of the appropriate relationship when the operator and rider are participating in a common purpose, social or business, and they share the costs and expenses of the trip. Finally, it requires us to briefly look at the applicability of aviation guest laws when the pilot and the rider are engaged in a joint venture. For the lack of more adequate terminology, it is submitted that cases failling into these three aspects can and should be generically characterized as "mutual benefit" cases.

The first two classes of "mutual benefit" cases create the greatest lack of agreement from one aviation guest law jurisdiction to the next. Where the trip confers a benefit upon a voluntary organization to which both the operator and rider belong, appears from the *Cox* case, that such a benefit is not a sufficient "payment" for the flight. However, California has taken a more liberal position. In *Malloy v. Fong*[192] the California Supreme Court held that there was a sufficient benefit where both the driver and the rider were members of the same church, which was to benefit

[190] *Supra* note 157.
[191] *Id.* at Av. Cas. 17,432.
[192] 37 Cal. 2d 356, 232 P.2d 241 (1951).

from the trip. Likewise, it was earlier held that where the driver and plaintiff were engaged in a volunteer effort to promote the interests of a boy scout troop, and both persons were directly interested in the status of the troop, there was a sufficient "benefit" to warrant plaintiff being a passenger.[193] There is a hybrid case in Illinois that in part involves voluntary action by plaintiff-rider in pursuit of a mutual benefit. In *Perrine v. Charles T. Bisch & Son*[194] the court found a sufficient benefit where the rider accompanied her husband in the defendant's ambulance so as to assist in his care during the ride to the hospital. The plaintiff received no compensation; to the contrary, her purpose was to benefit her husband. The defendant's purpose was to benefit the husband and to realize gross revenue in exchange.

The second class of "mutual benefit" cases involves sharing of the expenses of operating the aircraft. Here we will have to look primarily to automobile guest cases for guidance. This issue has been the subject of substantial litigation.[195] In general, the outcome will turn upon whether the primary purpose of the trip or ride is social or business. Where the primary purpose is of a social or friendly nature, the plaintiff has a greater burden. Where there was an agreement prior to the trip,[196] and particularly where the driver refused to commence the journey unless the rider shared the expenses,[197] the plaintiffs have generally prevailed. When there is such an expressed agreement the quantum of the rider's contribution is less critical.[198] On the other hand, where sociality is the primary purpose and there is no prior agreement, then the rider's contribution must be substantial in relation to the total cost of the trip.[199] Payment of mere incidental expenses will not suffice;[200] nor will payment of the rider's pro-rata share of the costs.[201] When the purpose is purely of a business or commercial nature, but not a "joint venture," and both the operator and the rider stand to benefit from the ride, the plaintiff merely needs to show some contribution to the expenses of the trip.[202]

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[193] Woodman v. Hemet Union High School Dist., 136 Cal. App. 544, 29 P.2d 257 (1934); Vest v. Kramer, 158 Ohio St. 78, 107 N.E.2d 105 (1952).

[194] 346 Ill. App. 321, 105 N.E.2d 542 (1952).

[195] *See* Annotation, *Share-the-ride Arrangements or Car Pool As Affecting Status of Automobile Rider as Guest*, 10 A.L.R.3d 1087 (1966).

[196] Whitmore v. French, 37 Cal. 2d 744, 235 P.2d 3 (1951); Marks v. Newburger, 69 Ill. App. 2d 220, 216 N.E.2d 250 (1966); Kempin v. Mardis, 123 Ind. App. 546, 111 N.E.2d 77 (1953); Shumaker v. Kline, 333 Mich. 346, 53 N.W.2d 295 (1952); Elfers v. Bright, 108 Ohio App. 495, 162 N.E.2d 535 (1938); Beer v. Beer, 52 Ohio App. 276, 3 N.E.2d 702 (1935); *see* Georgetta, *The Motor Issue in a Guest Case*, INS. L.J. 583, 586 (1954).

[197] Corey v. Nelson, 361 F.2d 354 (9th Cir. 1966) (applying California law); Boyd v. Alguire, 153 N.W.2d 192 (S.D. 1967); McMahon v. De Kraay, 70 S.D. 180, 16 N.W.2d 308 (1944).

[198] Burrow v. Porterfield, 171 Ohio St. 28, 168 N.E.2d 137 (1960).

[199] Allison v. Ely, 159 N.E.2d 717 (Ind. App. 1959); Burrow, *supra* note 197; Duncan v. Hutchinson, 139 Ohio St. 185, 39 N.E.2d 140 (1942).

[200] Knuckles v. Elliott, ___ Ind. App. ___, 227 N.E.2d 179 (1967); Ledford v. Klein, 87 N.W.2d 345 (N.D. 1957); Greenhalgh v. Green, 16 Utah 2d 221, 398 P.2d 691 (1965); *see* RESTATEMENT (SECOND) TORTS, § 490, comment a; *see also* Notes, *The Indiana Guest Statute*, 34 IND. L.J. 338, 341 (1958-59).

[201] Rogers v. Vreeland, 16 Cal. App. 2d 364, 60 P.2d 585 (1936).

[202] Gillespie v. Rawlings, 49 Cal. 2d 359, 317 P.2d 601 (1957); Davis v. Woodcock, 101 Cal. App. 2d 618, 225 P.2d 918 (1951); Pence v. Deaton, 354 Mich. 547, 93 N.W.2d 246 (1958); Schmidt v. Robinet, 2 Mich. App. 45, 138 N.W.2d 563 (1966); Angel v. Constable, 40 Ohio Abs. 1, 57 N.E.2d 86 (1943); Marsh v. Irvine, 22 Utah 2d 154, 449 P.2d 996 (1969); *see* Annotation,

As too often occurs, there may be social and business purposes behind a particular flight. There, one must look at the chief or most influential purpose before making his analysis of what contribution to the expenses of the trip will be a sufficient payment or compensation.[203] However, where the operator is on a business purpose, and the rider is merely a social companion, unrelated to the business activity, the guest status prevails.[204] It should be noted that North Dakota expressly prohibits the sharing of expenses from being a sufficient benefit. There is no differentiation between social and business "rides."

The third class of "mutual benefit" cases involve an operator and rider who are involved in a "joint venture." Where there exists such a thorough going business relationship between the operator or owner and the rider, and the particular flight is in pursuit of the affairs of the "joint venture," clearly the ride does not involve a gratuity. Hence, the aviation guest statute would be inapplicable.[205] The elements of a true joint venture are:

> 1. an agreement, express or implied, among the members of the group;
> 2. a common purpose to be carried out by the group;
> 3. a community of pecuniary interest in that purpose, among the members; and,
> 4. an equal right to a voice in the direction of the enterprise, which gives an equal right to control.[206]

The existence of a mere common purpose will not be enough.[207]

However, since some jurisdictions deny recovery to one joint venturer and not to another, the plaintiffs should realize that for purposes of circumventing the aviation guest statute, it will be sufficient if they show only the first three elements of a joint venture, without showing any right to control the aircraft or the course of flight.[208]

In summary, the following factors are to be analyzed before reaching a definite conclusion regarding the existence of a sufficient "payment" or "compensation" so as to preclude application of the various aviation guest laws:[209]

> 1. existence of an express agreement between the rider or someone on his behalf and the pilot or aircraft owner or someone on their behalf;
> 2. receipt of any tangible benefit at any time, by the pilot or owner or someone in their behalf, from the rider or someone in his behalf, which is related to the purpose of the flight;
> 3. the motivational influences affecting the pilot's decision to take the rider along on the flight;

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*Mutual Business or Commercial Objects or Benefits as Affecting Status of Rider Under Automobile Guest Statutes*, 59 A.L.R.2d 336 (1958).

[203] Halbert v. Berlinger, *supra* note 157; Smith v. Franklin, 14 Utah 2d 16, 376 P.2d 541 (1962); *see* Note, HOUSTON L. REV. 690, 694 (1967).

[204] Jennings v. Hodges, 129 N.W.2d 59 (S.D. 1964).

[205] Elisalda v. Welch's Sand & Gravel Co., 260 Cal. App. 2d 46, 67 Cal. Rptr. 57 (1968); Mukasey v. Aaron, 20 Utah 2d 383, 438 P.2d 702 (1968); De Lacy, *Trials Under the Guest Statute*, 15 NEB. L. BULL. 306, 309 (1936-37).

[206] Mukasey, *supra* note 205, at P.2d 704; *see* RESTATEMENT (SECOND) TORTS, § 491.

[207] *See* Note, *The Ohio Guest Statute*, 10 U. CIN. L. REV. 289, 297 (1936).

[208] Walker v. Adamson, 9 Cal. 2d 287, 70 P.2d 914 (1937); *and see* 1 A PERSONAL INJURY—ACTIONS—DEFENSES—DAMAGES, § 1.11(5)(d), at 283 (1968).

[209] *See* Note, 22 U. MIAMI L. REV. 174, 178 (1967).

4. the social and business aspects of the purposes for the flight;
5. the existence of a mutual benefit to be enjoyed by a common third party or between the pilot or owner and the rider themselves; and,
6. the previous relationship between the pilot or owner and the rider.

Assuming the due creation of the host-guest relationship, it, like most things, has a beginning and an ending.

### E. *Beginning and Ending of Host-Guest Relationship*

Assuming that there is in fact a host-guest relationship, one must determine whether it was legally effective at the time of the accident. Since each guest statute is couched in such terms as "the ride" or "the transportation," we must injuire into what constitutes the beginning of the rider or transportation. Initially, the specific provisions of the applicable statute must be carefully examined. In terms of when the trip commences, the sixteen statutes can be roughly divided into two categories. The first defines the duration of the host-guest relationship in terms of the riders' physical relationship to the aircraft. California, Illinois, Nebraska, Nevada, New Mexico and Utah require that the rider be "in" the aircraft. California uses the phrase "in or upon any aircraft." The second group defines the relationship in terms of the activity of "riding" or transporting." States in this group are Delaware, Idaho, Indiana, Michigan, North Dakota, Oregon, South Carolina and South Dakota. Arkansas tends to combine these two groups by using the language "transported . . . in aircraft. . . ." As with other particular portions of these statutes, this type of analysis may be critical to the outcome of the litigation, for one must always remember that all aviation guest statute states, except South Dakota, construe thtse statutes narrowly and in favor of he rider.

The "ride" or "transportation" begins, at the very earliest, when the rider actually commences the process of leaving the ground and attempting to enter the aircraft. Such an interpretation has been followed in Illinois and Uah in regard to automobiles.[210] In *Tallios v. Tallios*,[211] the Illinois court reasoned that if the ride did not begin until the rider was seated in the vehicle, the purpose for the guest statute would be defeated or impaired.

Although the operative language in the Illinois automobile guest statute; i.e., "in or upon," was virtually identical to that in the California and Ohio statutes, the latter two states reached much less restrictive definitions of when he ride begins. California has taken a very liberal view. The relationship does not begin until the rider actually enters the vehicle.[212] Clearly it does not apply while the rider is standing outside the vehicle.[213]

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[210] Rosenbaum v. Raskin, 103 Ill. App. 2d 469, 243 N.E.2d 616, 621 (1968); Tallios v. Tallios, 350 Ill. App. 299, 112 N.E.2d 723, 725 (1953); Andrus v. Allred, 17 Utah 2d 106, 404 P.2d 972 (1965); *see* Comment, 2 S.D. L. REV. 98, 101 (1957).

[211] *Supra* note 210.

[212] Trigg v. Smith, 246 Cal. App. 2d 510, 54 Cal. Rptr. 858 (1966); *see* Note, 16 TEX. L. REV. 590 (1937-38).

[213] Boyd v. Cress, 46 Cal. 2d 164, 293 P.2d 37 (1956); *see* Annotation, *Liability, Under Guest Statutes, of Driver or Owner of Motor Vehicle for Running Over or Hitting Person Attempting to Enter the Vehicle*, 1 A.L.R.3d 1083 (1965).

Going one step further, in California the ride has not begun even though the rider has one foot on the vehicle and the other on the ground.[214]

It seems relatively clear that Ohio follows the liberal California view. In *Economou v. Anderson*,[215] the court held that the rider was not being transported in or upon the vehicle when the plaintiff received injuries during the process of entering the vehicle. Further, in *Lewis v. Woodland*,[216] the rider had entered and was injured while closing the door. The court held that the injury was in no way related to the operation of the vehicle. Hence, the guest statute did not apply. Michigan apparently sides with California and Ohio.[217]

Once the relationship of host and guest is created and the ride or transportation begins, when does the relationship terminate?[218] Generally, there are two facets to this question: first, when does the relationship terminate because the "ride" or "transportation" has ended? and Secondly, when, if ever, does the relationship terminate because of the operator's conduct, although the ride continues?

As to when the ride terminates, there is some unanimity in the aviation guest law jurisdictions. California, Illinois, Nebraska and Utah take the position that the ride, and necessarily the relationship, terminates when the rider has safely alighted.[219] In *Kolar v. Divis*,[220] the Nebraska Supreme Court extended the life of the host-guest relationship beyond the physical act of contact with the ground. There the rider drowned a few seconds after alighting from the vehicle. The automobile guest statute was applied. There was no evidenceof any misconduct by the driver after the rider had vacated the vehicle. Clearly, the host cannot hang onto the guest statute shield for protection once the rider has alighted and his subsequent misconduct causes injury to or death of the rider.[221]

One aspect of this first issue has created diversity among jurisdictions —whether or not the relationship terminates during a stop or interruption in the ride. California[222] and Ohio[223] have squarely held that the host-guest relationship terminates during any temporary stop or interruption in the ride so long as the rider is outside the vehicle. The relationship does not resume until the rider once again re-enters tht vthicle. However, where the operator momentarily vacates the vehicle, but retains the right of control, the relationship does not automatically terminate.[224] Illinois

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[214] Elisalda, *supra* note 205; Smith v. Pope, 53 Cal. App. 2d 43, 127 P.2d 292 (1942).

[215] 4 Ohio App. 2d 1, 211 N.E.2d 82 (1965).

[216] 101 Ohio App. 442, 140 N.E.2d 322 (1955).

[217] Hunter v. Baldwin, 268 Mich. 106, 255 N.W. 431 (1934).

[218] *See* Annotation, *Commencement and Termination of Host and Guest Relationship Within Statute or Rule as to Liability for Injury to Automobile Guest*, 146 A.L.R. 682 (1943).

[219] Trigg, *supra* note 212; Todd v. Borowski, 25 Ill. App. 2d 367, 166 N.E.2d 296, 302 (1960); Tallios, *supra* note 210; Kolar v. Divis, 179 Neb. 756, 140 N.W.2d 658 (1966); Andrus, *supra* note 210.

[220] *Supra* note 219.

[221] Tubbs v. Argus, 140 Ind. App. 695, 225 N.E.2d 841 (1967); *see* Annotation, *Liability of Vehicle Driver or Owner for Running Over or Hitting Former Passenger or Guest Who Has Alighted*, 50 A.L.R.2d 974 (1956).

[222] Campbell v. Adams, 250 Cal. App. 2d 756, 59 Cal. Rptr. 63 (1967); Trigg, *supra* note 212.

[223] Clinger v. Duncan, 166 Ohio St. 216, 141 N.E.2d 156 (1957).

[224] Panopulos v. Maderis, 47 Cal. 2d 337, 303 P.2d 738 (1956).

and Utah takes a more restrictive position. In *Todd v. Borowski*,[225] the Illinois court held:

> The phraseology 'operating his automobile' is not necessarily limited only to a state of physical motion produced by the mechanism of the car, but it includes at least ordinary stops in, on and about the highway, and those are to be regarded as fairly incidental to the operating thereof.

However, in *Radolph v. Webb*,[226] the same court refused to apply tht guest statute to a guest who had alighted for the purpose of putting money in a parking meter and where it was not certain that the guest was going to return to the vehicle later. Hence, in Illinois one must look to the purpose of the stop or interruption before it can be determined whether the ride has temporarily terminated.[227] Utah adheres to the rule that the "ride" includes any incidents which happen in the course of and arising out of the transportation.[228]

Another very interesting and related question, which has arisen in guest law litigation, is whether a host-passenger relationship can be terminated when the primary purpose of the "ride" changes from business to social. In *Lyon v. City of Long Beach*,[229] a California court held that although the operator received a sufficient benefit from the rider in regard to the ride from his home to the site of their common employment, there was no "compensation" for an immediately subsequent side-trip to get some coffee. Hence, the purpose of the total ride changed from business to social and the rider's status changed from "passenger" to "guest" prior to the accident. The precedential value of the *Lyon* case was somewhat undermined in *Halbert v. Berlinger*.[230] There the crash occurred during a side-trip and after the business goal had been accomplished. The court reasoned that the side-trip to do some hunting was part and parcel of the operator's effort to get the rider to employ his company to do a proposed construction job. Hence, the defendant's argument that the rider had become a "guest" prior to the accident was rejected. A similar result was reached by the Oregon Supreme Court in *De Foor v. Lematta*,[231] but the issue was not discussed.

The second aspect of termination of the host-guest relationship is more intricate an dmore difficult to prove; i.e., has the operator's conduct resulted in termination of the relationship although the ride continues?[232]

The rule was clearly stated by the Georgia Court of Appeals in *Anderson v. Williams*:[233]

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[225] *Supra* note 219.
[226] 44 Ill. App. 2d 118, 194 N.E.2d 379 (1963).
[227] Flodberg v. Whitcomb, 79 Ill. App. 2d 320, 224 N.E.2d 606 (1967).
[228] Andrus, *supra* note 210.
[229] 92 Cal. App. 2d 472, 207 P.2d 73 (1949).
[230] *Supra* note 157.
[231] *Id.*
[232] *See* Fribourg, *Guest-Host Relation Termination After Beginning of Journey*, 5 CLEVE-MAR. L. REV. 101 (1956); Annotation, *Protest By Guest Against Driver's Manner of Operation of Motor Vehicle as Terminating Host-Guest Relationship*, 25 A.L.R.2d 1448 (1952).
[233] 95 Ga. App. 684, 98 S.E.2d 579, 581 (1957); *see also* Blanchard v. Ogletree, 41 Ga. App. 4, 152 S.E. 116 (1929).

> The plaintiff, although originally a guest to whom the driver owed only the duty of slight care, brought about what amounted to a change in the legal relationship of the parties by reason of her request to be permitted to leave the car. . . . [By] Anderson's refusal to allow her to do so, and [since she was a] passenger therein against her will, the defendant Anderson owed her the duty to exercise ordinary care in her behalf.

California,[234] Ohio,[235] and Oregon[236] follow the Georgia rule. However, in Oregon there must be a showing that the acceptance of the gratuitous transportation has been rescinded. To do so there must be more than a protest by the rider to the operator. The operator must clearly refuse to acceded to the guest's demand. In *Stiltner*, the Ohio court introduced a further required showing of the operator's state of mind:

> . . . [A] guest . . . does not cease to be a guest . . . as long as the driver of the vehicle reasonably intends to give hospitality that will benefit his rider, especially where the hospitality is the same that the rider expected to receive on entering the vehicle—in this case a ride to the driver's home.[237]

Washington, a non-aviation guest law jurisdiction, illustrates the diametrically opposing view.[238] There "once a guest-host relation is established, subsequent demands by the plaintiff (rider) to be let out of the car do *not* terminate the relation." [Emphasis added.].[239] The rule has been strongly criticized:

> The guest-host relationship is established on the tenuous thread of a mutual social benefit. No authority can be found to state that the host may not terminate the relation at will, for the plain reason that the relation arose the same way. To hold that a guest may be denied the power to terminate, while the host retains such power, is to give the relation a construction incompatible with its meaning.[240]

It would seem that the position to be taken by those aviation guest statute jurisdictions that have yet to commit themselves on this question would logically depend upon the particular philosophy of the nature of the relationship adopted in that state. If the jurisdiction adheres to the consensual theory of the creation of the relationship, then it would follow that the host-guest relation should be equally terminable upon rescission of that consent.

Before concluding our discussion of the status of the rider, note should be taken of certain miscellaneous cases that could have direct application to certain aviation activity.

### F. *Miscellaneous*

In *Langford v. Rogers*[241] and *Vest v. Kramer*,[242] the Michigan and Ohio

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[234] Barr v. Carroll, 128 Cal. App. 2d 23, 274 P.2d 717 (1954).
[235] Stiltner v. Bahner, 10 Ohio St. 2d 216, 227 N.E.2d 192, 196 (1967); Redis v. Lynch, 169 Ohio St. 305, 159 N.E.2d 597, 599 (1959).
[236] Senechal v. Bauman, 232 Ore. 217, 375 P.2d 60, 62 (1962).
[237] *Supra* note 235, at N.E.2d 197.
[238] Tyalor v. Taug, 17 Wash. 2d 533, 136 P.2d 176 (1943).
[239] Fribourg, *supra* note 232, at 105.
[240] *Id.* at 108.
[241] 278 Mich. 310, 270 N.W. 692 (1936).
[242] 158 Ohio St. 78, 107 N.E.2d 105 (1952).

Supreme Courts, respectively, were faced with the issue of whether the automobile guest statute of their state applied to a vehicle that was being towed by the operator. The Michigan court held that the statute applied to riders on a sled being towed behind the defendant's car. Similarly, the Ohio court ruled that the statute applied to riders in a trailor being towed behind the operator's automobile. Query, would the various aviation guest laws apply to riders in a glider while it was being towed to altitude by the defendant's aircraft? In Michigan and Ohio, the answer would appear to be in the affirmative.

Another curious anomaly of aviation guest law occurred when two commonly aircraft crashed after a midair collision over Norwalk, California.[243] Each aircraft was owned by the Unived States government. The defendant raised the California aviation guest statute as a bar to the plaintiff's recovery. In the court's opinion it was unnecessary to consider the issue, because as to the pilot of the other aircraft there clearly was no host-guest relationship with the plaintiff's decedent. Therefore, the statute would not apply to that pilot and thus not to his employer, the United States. Hence, it would appear that where the accident involves a collision between two aircraft owned by the same defendant, that the aviation guest statute would not apply.

These three cases could result in non-application of an aviation guest law where the defendant's glider referred to above is hit by the defendant's tow-plane after the line is released. A very curious thing indeed are these guest laws!

We have now come to the most troublesome aspect of guest law litigation. Has the plaintiff shown sufficient misconduct by the defendant so as to satisfy the applicable diminished standard of care?

## V. Diminished Standards of Care Owed by Hosts to Guests

### A. *Introduction*

All aviation guest laws in the United States provide certain exceptions to their applicability. While they all preclude imposition of liability on the basis of simple negligence, they do allow recovery of the guest or his heirs if the host was guilty of aggravated misconduct. Thus, each law diminishes the standard of care owed by a host to a guest in varying degrees. Among the seventeen American jurisdictions that clearly adhere to aviation guest laws, there is great variation in the language used to describe these reduced standards. Herein we will try to untangle this semantic mess.

Below is a listing of the diminished standards and the states wherein they are applied:

| *Standard* | *States* |
|---|---|
| 1. Gross Negligence | Georgia, Idaho, Michigan, Nebraska, |
| 2. Heedlessness or Reckless Disregard of the Rights of Others | Nevada, North Dakota and Oregon New Mexico and South Carolina |

[243] Moore v. U.S., 178 F. Supp. 264 (N.D. Ala. 1959).

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|---|---|
| 3. Wilful and Wanton Disregard of the Rights of Others | Arkansas and Delaware |
| 4. Wilful and/or Wanton Misconduct | Illinois, Indiana, Michigan, North Dakota, Ohio and South Dakota |
| 5. Wilful Misconduct | California, Nevada and Utah |
| 6. Intentional | Delaware, New Mexico, Oregon and South Carolina |
| 7. Intoxication or Under the Influence of Intoxicating Liquor | California, Idaho, Nebraska, Nevada, North Dakota, Oregon and Utah |

As with the question of status, the guest has the burden of proving that the host was guilty of the applicable diminished standard of care.[244] Like status, the existence of the aggravated misconduct is usually a question of fact to be resolved by the trier of fact.[245] Further, it should be carefully noted that the doctrine of *res ipsa locquitur* is not available to plaintiffs in meeting this burden in a guest case.[246]

After fifty-three years of judicial experience with these varying concepts of reduced civil fault, there is great uncertainty as to their meaning. Professors Harper and James describe the situation in these harsh terms:

> Disagreement and confusion have marked judicial attempts to define these terms, even within a single jurisdiction. Often they add nothing helpful to the language of the statute itself. The problem of putting a rule into words is even greater if states with similar statutes are taken together.[247]

Hence, it is close to impossible to device any formulation of the definitions that will be functional in any given factual situation.[248]

Whereas automobile guest cases were helpful in defining "status," they are of little assistance in trying to analyze specific aviation guest cases so as to determine the presence of one or more of the aggravated acts of wrongful doing that will satisfy the applicable guest statute. It is axiomatic in tort law that whatever the standard of care to be applied, it still must be adapted to the framework and context of the specific human activity. Little empirical analysis need be done for one to realize that aircraft operation varies greatly from automobile travel. This factual differentiation has been judicially recognized:

> We take judicial notice of the difference between air traffic and travel by rail, highway, and canal. The speed, the variable three-dimensional movement of the aircraft in flight, the complexity of instrumentation and controls, the necessity for constant vigilance, and the ever-present threat of disaster in case of accident all require higher skills, greater precautions, and heavier

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[244] Guyton v. Guyton, 244 S.C. 357, 137 S.E.2d 273 (1964). The California statute expressly imposes that burden on plaintiff. *See* Appendix.

[245] Goncalves v. Los Banos Mining Co., 58 Cal. 2d 916, 376 P.2d 833 (1962); Fisher v. Zimmerman, 23 Cal. App. 2d 696, ___ P.2d ___ (1937); Todd, *supra* note 219.

[246] Phillips v. Noble, 50 Cal. 2d 163, ___ P.2d ___ (1958); Lincoln v. Quick, 133 Cal. App. 433, ___ P. ___ (1933); Garland v. Greenspan, 74 Nev. 89, 323 P.2d 27 (1958); Nyberg v. Kirby, 65 Nev. 50, 188 P.2d 1006 (1948); *see* Comment, 8 DRAKE L. REV. 128, 133 (1958).

[247] 2 HARPER & JAMES, THE LAW OF TORTS 952 (1956); *see also* Comment, *The Ohio Guest Statute*, 22 Ohio St. L.J. 629, 630 (1961).

[248] Emons v. Shiraef, 359 Mich. 526, 102 N.W.2d 490 (1960); Garrett v. Howden, 73 N.M. 307, 387 P.2d 874, 878 (1963).

responsibilities to constitute due care in the operation of aircraft than in the operation of land or water vehicles.[249]

The impact of this technological difference upon guest law litigation was well expressed by the Supreme Court of Virginia in *Walthrew v. Davis*:[250]

> . . . there are obvious and marked differences between transportation by automobile and by airplane and the hazards and risks incident to each. *What would be slight negligence in the operation of an automobile might be gross negligence with disasterous results in the operation of an airplane.* A guest displeased with and alarmed at his host's negligent operation of an automobile may get out and take to the highway on foot. A guest in an airplane has no such election, but must suffer the consequence of his host's negligence which is frequently fatal. [Emphasis added.].

Hence, in regard to what in fact will or should constitute "gross negligence," "reckless disregard," or "wilful or wanton misconduct" in aviation guest cases will have to be left to future litigation. Until that time we can start with the general definitions that now prevail and with the few reported aviation cases that have dealt with these concepts. Further, there are certain automobile guest cases that suggest analogous rules applicable to aviation.

### B. *"Gross Negligence"*

The judicial concept of "gross negligence" has had a long and inglorious history in the United States.[251] Our courts have had great difficulty in defining the meaning of "gross negligence" in terms of specific factual situations.[252]

There are certain basic propositions that are generally adopted. First, gross negligence involves a degree of culpability that exceeds ordinary or simple negligence at one end of the spectrum and wilful misconduct at the other.[253] Gross negligence and wilful misconduct are said to be "different in kind and the words descriptive of one commonly exclude the other."[254]

As pointed out earlier, in 1917 Massachusetts was the first American jurisdiction to adopt a diminished standard of care owed by a host to a gratuitous rider in an automobile. That standard was one of "gross negligence." In 1919 the Supreme Court of that state presented us with one of the earliest attempts at defining this chameleon-like concept:[255]

> Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. . . . It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. . . .

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[249] Lange v. Nelson-Ryan Flight Service, Inc., 259 Minn. 460, 108 N.W.2d 428, 432-33 (1961).

[250] 201 Va. 557, 111 S.E.2d 784, 786 (1960).

[251] *See* 74 A.L.R. 1198 (1931); 86 A.L.R. 1145 (1933); 91 A.L.R. 554 (1934); 96 A.L.R. 1479 (1935); 136 A.L.R. 1256 (1942); 21 A.L.R.2d 209 (1952); 6 A.L.R.3d 769 (1966).

[252] *See* Note, 34 U. DET. L.J. 169, 170 (1956); Georgetta, *supra* note 196, at 589-90.

[253] Walker v. Moser, 201 So.2d 609 (Fla. App. 1967); Ledford v. Klein, 87 N.W.2d 345 (N.D. 1957).

[254] Ledford, *supra* note 253, at 352.

[255] Altman v. Aronson, 231 Mass. 588, 121 N.E. 505, 506 (1919).

Arkansas,[256] California,[257] Georgia,[258] Nebraska,[259] and Nevada[260] have agreed with this early definition.

As one would imagine this simplistic approach did not last. "Appreciably higher," very great," "absence of slight diligence" and "want of even scant care" did not resolve the problem. Their meaning in concrete terms remained equally nebulous. It did not take the courts long to realize this semantical snake-pit. They began to add a new element to the concept. North Dakota equated gross negligence with an utter indifference on the part of the host *to the consequences of his wrongful act.*[261] [Emphasis added.] Idaho,[262] Nebraska[263] and Oregon[264] converted indifference to the consequences into an indifference to or reckless disregard for the safety of the guests in the vehicle. Oregon went so far as to include a definition of gross negligence in its guest statute which applies to automobiles, aircraft and watercraft:

> Gross negligence . . . is characterized by conscious indifference to or reckless disregard of the rights of others.[265]

Needless to say, reliance upon "reckless disregard" has not solved the problem either. What constitutes "reckless disregard"? Both Idaho[266] and Oregon[267] turned to the Restatement of Torts, Second, for a definition. Section 500 attempts to define "reckless disregard" in these terms:

> The actor's conduct is in reckless disregard of the safety of another if he does not act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

As we will see below, this definition comes very close to the concept of the wilful and/or wanton misconduct doctrines applied in Arkansas, California, Delaware, Illinois, Indiana, Michigan, Nevada, North Dakota, Ohio, South Dakota and Utah. In fact, South Dakota[268] and Michigan[269] have expressly equated "gross negligence" with "wilful and wanton misconduct." However, such equating is not the majority rule.[270]

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[256] Spence v. Vaught, 236 Ark. 509, 367 S.W.2d 238, 240 (1963).

[257] Kastel v. Stieber, 215 Cal. 362, ___ P. ___ (1932). As originally enacted in 1929, the automobile guest statute contained gross negligence. It was deleted by amendment in 1931.

[258] Sammons v. Webb, 86 Ga. App. 382, 71 S.E.2d 832 (1952).

[259] Brugh v. Peterson, 183 Neb. 190, 159 N.W.2d 321 (1968); *see* Spikes, *Gross Negligence Under the Guest Statute*, 22 NEB. L. REV. 264 (1943).

[260] Stiff v. Holmes, 450 P.2d 153 (Nev. 1969).

[261] Jacobs v. Nelson, 67 N.D. 30, 268 N.W. 873 (1936).

[262] Peterson v. Parry, 92 Idaho 647, 448 P.2d 653, 662-63 (1968).

[263] Brugh, *supra* note 259; Mierendorf v. Saalfeld, 295 N.W. 901 (Nev. 1941); Larson v. Storm, 289 N.W. 792 (1940).

[264] Williamson v. McKenna, 223 Ore. 366, 354 P.2d 56, 68 (1960); Turner v. McCready, 190 Ore. 28, 222 P.2d 1010, 1018 (1950).

[265] *See* Appendix.

[266] Peterson, *supra* note 262.

[267] Williamson, *supra* note 264.

[268] Minick v. Englert, 167 N.W.2d 552 (S.D. 1969); Granflaten v. Rohde, 283 N.W. 153 (S.D. 1938); Melby v. Anderson, 64 S.D. 249, 266 N.W. 135 (1936).

[269] Bobich v. Rogers, 258 Mich. 343, 241 N.W. 854 (1934).

[270] Comment, 24 IOWA L. REV. 765 (1939).

It should be noted that, historically, we have moved toward a definition that emphasizes the potential consequences of the host's wrongdoing. The courts have become concerned to a lesser extent with the subjective quality of acts per se. This shift in emphasis is very important to the application of the concept of gross negligence to aviation accident litigation. Because of the greater speed, momentum and mobility of aircraft, as compared to automobiles, the consequences of wrongdoing can be much greater. What would be a "fender-bender" in the collision of two automobiles would be human disaster between two aircraft. Operating an automobile in conditions of poor visibility may simply mean a slower velocity. In an aircraft without an instrument-trained pilot, it would probably mean vertigo or spatial disorientation resulting in a graveyard spiral or other loss of control.

Finally, defining gross negligence in terms of reckless disregard of the safety of others introduces into the litigation the subjective element of the state of mind of the pilot. This is clearly the impact of the phrase "knowing or having reason to know" found in Section 500 of the restatement quoted above. Below, we will examine this aspect of guest law litigation in terms of this and the other diminished standards of care under the statutes.

What constitutes gross negligence in the operation of aircraft has been litigated to a certain extent.[271] In the *Huguley* case, the question of what constitutes gross negligence came up in the context of an attack upon the pleadings. The court ruled that the allegation that the pilot, who was not trained to fly by reference to cockpit instruments, failed to keep a proper lookout ahead in order to avoid terrain obstructions, was sufficient to raise the issue of gross negligence for the jury. In dicta the court indicated that it may have been gross negligence for a non-instrument rated pilot to have even attempted a take-off where by slight diligence the pilot could have learned that adverse weather conditions would have prevented visual flight rules[272] operations. In essence, the existence of such climatic conditions in such a situation would preclude any possibility of maintaining a lookout. The court sustained the allegations of gross negligence.

The question of what constitutes gross negligence was again litigated in a procedural context in *Drahmann v. Brink*.[273] A motion for a directed verdict in favor of the defendant was granted by the trial court. Hence, the question before the court was whether the plaintiff had presented sufficient evidence of gross negligence to require submission of that issue to the jury. The Kentucky appellate court, applying Georgia law, held that the issue should have gone to the jury. The evidence indicated the following errors by the pilot, all in violation of then existing regulations:

1. final approach at too high an altitude and too great a speed to permit a landing;

[271] Citizens & Southern National Bank v. Huguley, 100 Ga. App. 75, 110 S.E.2d 63 (1959); Drahmann v. Brink, 290 S.W.2d 449 (Ky. Civ. App. 1956) (applying Georgia law); Sammons, *supra* note 258; Steinbock v. Schiewe, 330 F.2d 510 (9th Cir. 1964) (applying Oregon law).

[272] *See* Av. Reg. 33 C.F.R., § 91.105 (1949), for explicit details of visibility minimums for visual flight.

[273] *Id.*

2. during the overshoot procedure, leaving the aircraft's flaps and landing gear in the down position;
3. failing to execute the proper procedure for the go-round on the second landing approach;
4. attempting the second landing partially down-wind and partially cross-wind, when he could have landed into the wind;
5. attempting a mid-field landing; and,
6. failing to apply additional power to or adjust the pitch of his propeller during the second attempted go-round.

As a result of all these errors, the aircraft stalled and crashed during the second attempted go-round.

*Sammons v. Webb*[274] is another case applying Georgia law and involving errors in aircraft operations. A jury returned a verdict for plaintiff on the issue of gross negligence and the defendant appealed from the resulting judgment, which was affirmed. The court ruled that the following evidence warranted submission of the issue of gross negligence to the jury:

1. operation of the aircraft at dusk when visibility was poor, thus preventing the pilot from seeing a landing field some three or four miles from the crash site;
2. the pilot attempted a landing on a roadway knowing that there were guy wires supporting power line poles along the road;
3. the aircraft was functioning properly and had sufficient fuel to fly to the near-by airport; and,
4. the pilot had the smell of alcohol on his breath just after the crash.

In passing it should be noted that in an automobile case it was held that being under the influence of intoxicating liquor would not alone be sufficient to show gross negligence,[275] although it may be one element. The relationship of alcohol consumption to diminished standards of care under aviation guest statutes will be dealt with below. But, in the nine jurisdictions that do not expressly except such cases from the guest statute, it would seem to be the better rule, given the different nature of automobile and aircraft operations, that merely attempting to operate an aircraft while under he influence of intoxicating liquor or drugs would be a sufficient showing of gross negligence.

Our final case involving gross negligence in an aircraft accident is *Steinbock v. Schreive*.[276] Jury verdicts were returned in favor of the plaintiffs-guests under the Oregon aviation guest statute. The appellate court ruled that the gross negligence issue was properly submitted to the jury. The crash occurred on take-off. At about seventy-five feet the engine sputtered, and the aircraft lost power and crashed. The following items of wrongdoing were supported by the evidence:

1. the pilot inadequately conducted the pre-flight check of the fuel tanks;
2. the pilot took off without adequate fuel in the left wing tank;
3. the pilot failed to switch to the right wing tank after loss of power; and,

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[274] *Id.*
[275] Montgomery v. Ross, 156 Neb. 875, 58 N.W.2d 340 (1953).
[276] *Supra* note 271.

4. the pilot failed to properly handle the aircraft after loss of power so as to glide back to the field.

In conclusion, the automobile guest case of *In re Byrne's Estate*,[277] suggests an important analogy for aviation guest cases. There the court held that the operator was guilty of gross negligence where he operated his car knowing that it was in a defective condition, and that the defect was not known to nor discoverable by the guest.[278]

Now let us turn to one of the more curious and puzzling concepts of diminished care found in aviation guest statutes; i.e., "heedlessness or reckless disregard of the rights of others."

### C. *"Heedlessness or Reckless Disregard of the Rights of Others"*

As indicated above, New Mexico and South Carolina except from their aviation guests statutes any accidents caused by the "heedlessness or reckless disregard of the rights of others" on the part of the owner or operator. The questions to be answered are:

1. Does this exception create two standards of care; i.e., one involving heedlessness and the other involving reckless disregard for the rights of others?
2. If only one diminished standard is involved, is it more akin to gross negligence or wilful and wanton misconduct?

Early in the history of the South Carolina automobile guest statute, the court was faced with the issue of what was its proper construction. Although the state legislature used the word "or," the South Carolina Supreme Court held that the exception created only one diminished standard of care, not two. Hence, the exception should read "heedlessness *and* reckless disregard of the rights of others."[279] The court reasoned that since heedlessness had been held to be equal[280] to carelessness or simple negligence, and if it were held to be a separate and distinct exception to the guest statute, the legislature woul dhave performed a useless and futile act when it enacted the statute, as the host would remain liable to the guest as he was at common-law. Therefore, it would appear that we are here leading with only one exception to the New Mexico[281] and South Carolina statutes.[282]

The answer to the second question is not so easy. In *Fulghum v. Bleakley*[283] the South Carolina Supreme Court adopted a definition of "reckless

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[277] 277 N.W. 74 (Neb. 1938).

[278] For a more detailed discussion of this relationship between defects in the vehicle and diminished standards of care under great statutes, *see* Note, *Mechanical Defects Held to Fall Under the Provisions of the Guest Statute*," 2 S. CAL. L. REV. 149 (1957).

[279] Cummings v. Tweed, 195 S.C. 173, 10 S.E.2d 322 (1940).

[280] Fulghum v. Bleakley, 177 S.C. 286, 181 S.E. 30 (1935).

[281] In Gill v. Hayes, 188 Okla. 434, 108 P.2d 117 (1940) the Supreme Court reached the same conclusion regarding the New Mexico automobile guest statute as South Carolina did in Cummings.

[282] Both New Mexico and South Carolina had used the Connecticut automobile guest statute as a model. It contained the identical language of exception and had been construed in the same manner in Bordonaro v. Senk, 109 Conn. 428, 147 A. 136 (1929).

[283] *Supra* note 280, at S.E. 33.

disregard of the rights of others" that had been given six years earlier by the Supreme Court of Connecticut in *Bordonaro v. Senk*;[284] to wit:

> Act or conduct in reckless disregard of the rights of others is improper or wrongful conduct, *and constitutes wanton misconduct*, evincing a reckless indifference to consenquences to the life, or limb, or health, or reputation or property rights of another.[285] [Emphasis supplied].

To be sure this has a familiar ring to it. One is reminded of the Oregon statutory definition of gross negligence discussed above. However, consideration of the case definitions under the New Mexico statute clearly reveals that "heedlessness or (and) . . . reckless disregard of the rights of others" is much more akin to "wilful and wanton misconduct" than "gross negligence."

In *Forsyth v. Joseph*,[286] the New Mexico Court of Appeals pointed out these interrelationships:

> . . . the words 'heedlessness or a reckless disregard of the rights of others,' have a rather well-defined meaning under our Guest Statute. This meaning *contemplates something other than and different from negligence*, and contemplates culpability arising from conduct which is motivated by a particular state of mind. This particular state of mind is one of utter irresponsibility or conscious abandonment of any consideration for the safety of guest passengers. [Emphasis added.].

Finally, *Carpenter v. Yates*[287] resolves any remaining doubt that we are not dealing with "gross negligence." There the court ruled that the state of mind of the host that the guest must show to recover under this exception is similar to that which the state must show to sustain a conviction for involuntary manslaughter for death resulting from operation of an automobile.

At the risk of over simplification and with great trepidation in attempting to propose general rules in this tangled thicket, let us, as did the Oklahoma Supreme Court in *Gill v. Hayes*,[288] suggest that "heedlessness or (and) reckless disregard" constitutes a degree of culpability approaching, if not identical to, wilful and wanton misconduct.

### D. *"Wilful And Wanton Disregard Of The Rights Of Others," And "Wilful And/Or Wanton Misconduct," And "Wilful Misconduct"*

Eleven of the seventeen states that unequivocally adhere to aviation guest laws have exceptions, which allow recovery by a guest, based on either "wilful and wanton disregard of the rights of others," or "wilful and/or wanton misconduct," or "wilful misconduct." The case law de-

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[284] *Supra* note 282, at A. 137.

[285] In Fowler v. Franklin, 58 N.M. 254, 270 P.2d 389 (1954), the court held that heedlessness and reckless disregard constituted wanton misconduct.

[286] 80 N.M. 27, 450 P.2d 627, 629 (1968).

[287] 58 N.M. 513, 273 P.2d 373 (1954).

[288] *Supra* note 281, at P.2d 120; *see* Sheets v. Stalcup, 13 N.E.2d 346 (Ind. Civ. App. 1938), where the court equated "reckless disregard" with "wanton or wilful misconduct." *See also* Emery v. Emery, 45 Cal. 2d 421, ___ P.2d ___ (1955), where the court held that wilful misconduct allegations in the complaint under California's guest statute would suffice to raise the issue of reckless disregard under the Idaho guest statute.

fining these concepts is a semantical nightmare.[289] There are, however, some common ideas running through these opinions.

It is generally agreed that the problem exists because, "[t]here is no exact standard of measurement for determination of where negligence ends and wilful and wanton misconduct begins, under the guest statute, and each case must be decided on its own facts."[290] There is agreement that the host must have manifested an intention to act wrongfully in the face of known or knowable circumstances that would create a probability that to so act would result in injury to the guest.[291] However, one need not show that the host intended to injure or kill the guest.[292] Finally, it is generally agreed that mere inadvertance or thoughtlessness is not sufficient.[293] Beyond these few areas of general consensus lie fields of conflicting definitions and irreconcilable applications to similar factual situations. Neither time, space nor patience permits a thoroughgoing analysis.

In brief, our job is narrowed to the definition of three concepts. Of the eleven jurisdictions referred to above, three—California, Nevada and Utah —rely upon the doctrine of "wilful misconduct." The remaining eight use varying combinations of the terms "wanton" and "wilful." Arkansas, Delaware, Indiana, and Ohio use "or" to separate "wanton" from "wilful" so as to modify either "disregard of the rights of others" or "misconduct." On the other hand, Illinois, Michigan, North Dakota and South Dakota rely upon "and" and thus provide that the "misconduct" must be "wilful and wanton." The realistic impact of this subtle semantic distinction will be demonstrated after we define "wilful misconduct."

One of the earliest attempts to give workable meaning to the concept of "wilful misconduct" occurred in *Meek v. Fowler*,[294] where the California Supreme Court stated two aspects:

> Wilful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton or reckless disregard of its possible result.

California has very recently reaffirmed its adherence to this highly abstract definition.[295] Twenty-five years after *Meek*, the Utah Supreme Court came

[289] Appleman, *Wilful and Wanton Conduct in Automobile Guest Cases*, 13 IND. L.J. 131, 142 (1936-37).

[290] Comment, 31 IOWA L. REV. 428, 429, n.3 (1946).

[291] Chappell v. Palmer, 236 Cal. App. 2d 34, 45 Cal. Rptr. 686 (1965); Wright v. Sellers, 25 Cal. App. 2d 603, ___ P.2d ___ (1938); Rowe v. Frazer, 83 Ill. App. 2d 367, 227 N.E.2d 781 (1967); Storckman v. Keller, 237 N.E.2d 602 (Ind. Civ. App. 1968); Tien v. Barkel, 351 Mich. 276, 88 N.W.2d 552 (1958); Mitchell v. Brewer, 193 N.E.2d 304 (Ohio Civ. App. 1962); Williamson, *supra* note 264; Minick v. Englert, ___ S.D. ___, 167 N.W.2d 551 (1969); Milligan v. Harward, 11 Utah 2d 74, 355 P.2d 62 (1960); Mundt, *The South Dakota Automobile Guest Statute*, 2 S.D. L. REV. 70, 71 (1957); Harper, *Development in the Law of Torts in Indiana, 1940-1945*, 21 IND. L.J. 447, 448 (1946); Comment, 24 IOWA L. REV. 765 (1939); Comment, 2 IDAHO L.J. 128, 132-33 (1932).

[292] Wright, *supra* note 291; Ehresman v. Town of Loda, 25 Ill. App. 2d 259, 166 N.E.2d 295 (1960); Tighe v. Diamond, 80 N.E.2d 122 (Ohio 1948); Note, 19 IND. L.J. 145 (1944); Comment, 2 IDAHO L.J. 128, 132 (1932).

[293] DeFalla v. Tuttle, 132 Cal. App. 2d 473, 282 P.2d 513 (1955); Todd v. Borowski, 25 Ill. App. 2d 367, 166 N.E.2d 296 (1960).

[294] 3 Cal. 2d 420, 45 P.2d 194, 197 (1935).

[295] *See* Olson v. Clifton, 273 Adv. Cal. App. 391, 78 Cal. Rptr. 296, 299 (1969).

forth with a slight modification, by adding to the definition, which appears to be that which is in use currently. In *Milligan v. Harvard*[296] the court stated:

> Wilful misconduct is the intentional doing of an act *or intentional omitting or failing to do an act*, with knowledge that serious injury is a probable and not merely a possible result, or the intentional doing of an act with wanton and reckless disregard of the possible consequences. [Emphasis added so as to indicate modification.]

There would appear to be room for one further improvement in this definition: query, should a pilot be guilty of "wilful misconduct" for intentionally omitting or failing to do an act with wanton and reckless disregard of the possible consequences?

It has been suggested that the appropriate diminished standard of care may depend upon whether the particular legislature inserted "or" as compared to "and" between "wanton" and "wilful."[297] The rationale is that where "or" is used the plaintiff need show either "wanton misconduct" or "wilful misconduct," but not both. Hence, the plaintiff would normally escape the clutches of the guest statute upon a showing of the less culpable standard of care; i.e., wanton misconduct. On the other hand, if the legislature placed "and" in its guest statute, the plaintiff would have to show both "wanton misconduct" and "wilful misconduct," or more pragmatically, the plaintiff would be saddled with "wilful misconduct" in every case. That writer's reasoning smacks of a logical and literal interpretation of the statutes involved. It is indicative of the war of words that is guest law litigation.

By comparing judicial definitions of these statutory provisions in "and" states and in "or" states, it will be seen that the courts are far from implementing this approach. Illinois and South Dakota each use "wilful and wanton misconduct" in their automobile and aviation guest statutes.[298] In *Klatt v. Commonwealth Edison Co.*,[299] the Illinois Supreme Court defined the exception thusly:

> . . . the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure after knowledge of impending danger to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care.

The Supreme Court of South Dakota has adopted a very similar definition of its identical statutory phrase.[300]

On the other hand, Indiana and Ohio use "or" to separate "wilful" and "wanton" in their automobile and aviation guest statutes. In *Storckman v. Keller*,[301] the appellate court of Indiana held that there were two ele-

[296] 11 Utah 2d 74, 355 P.2d 62, 63 (1960).
[297] Note, *The Indiana Guest Statute*, 34 IND. L.J. 338 (1958).
[298] *See* Appendix, and *supra* note 2.
[299] 33 Ill. 2d 481, 211 N.E. 720, 724 (1965).
[300] In Minick, *supra* note 291, at N.W.2d 554: "Willful and wanton misconduct may be considered as describing conduct of a driver when he does an act not conscious of the high degree of manifest danger, but under the circumstances where he should have known."
[301] 237 N.E.2d 602, 603-04 (Ind. App. 1968).

ments to "wanton or wilful misconduct:" (1) the driver must have had knowledge of an impending danger or have been conscious of a course of misconduct calculated to result in the probable injury to his guest; and (2) his actions must have exhibited his indifference to the consequences of his misconduct. Ohio has adopted a virtually identical definition for her guest statute provision which is worded "wilful or wanton misconduct."[302]

Not only does the variation in "and/or" appear to make little difference in judicial treatment of these provisions, but these definitions are somewhat similar to the concept of "wilful misconduct" discussed above.

As indicated above, the automobile and aviation guest statutes of Michigan, Nevada and North Dakota all contain either the "wilful misconduct" or "wilful and wanton misconduct" diminished standard of care. Each of those jurisdictions also provides in the alternative that the operator will be liable to his "guest" for his "gross negligence." When comparing the definitions of these standards it is obvious that "gross negligence" involves wrongdoing of a much lesser degree of culpability than does "wilful and wanton misconduct" or "wilful misconduct." It is hard to conveive of any factual situation that would support a finding of "wilful misconduct" or "wilful and wanton misconduct" that would not clearly support "gross negligence." The converse can be easily imagined. Hence, as a practical matter, in each case the plaintiffs need go no further than a showing of "gross negligence."

There are two reported aviation guest cases that deal with the issue of what constitutes "wilfully and wantonly operated in disregard of the rights of others" and "wilful misconduct."[303] In *Ferrell v. Topp*,[304] the trial court excluded testimony that before take-off the pilot had said that "if the mountains were too high he would just make a hole in one of them." The crash occurred when the aircraft struck a mountain en route. The court of appeals reversed the judgment. It's rationale was:

> In the case before us, we may assume that . . . [the pilot] had no intention of crashing the plane against the mountain or to injure his own son or his friend Ferrell. However, the evidence showed that immediately before the flight was undertaken, . . . [the pilot] was warned that the route he was electing was dangerous. In spite of that he chose the most dangerous route at a time when he knew he would be in dangerous territory after dark; further, he learned that there were clouds and fog making the flight even more dangerous. The evidence was that the clearance between the clouds and the top of the mountains was such as to render it unsafe for airplane traffic. It was further shown that . . . [the pilot] was flying at an altitude which was considered dangerous even in the daytime.[305]

The court concluded that the evidence clearly demonstrated that the "aircraft was wilfully and wantonly operated in disregard of the rights of the guests."[306]

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[302] Jenkins v. Sharp, 140 Ohio St. 80, 42 N.E.2d 755, 757 (1942).

[303] Ferrell v. Topp, 386 S.W.2d 33 (Mo. 1964) (applying Arkansas law); and Lightenburger v. Gordon, 81 Nev. 553, 407 P.2d 728 (1965).

[304] *Id.*

[305] *Id.*

[306] *See* the Arkansas aviation guest statute in the Appendix.

The second case, *Lightenburger v. Gordon*,[307] involved application of the California aviation guest statute by the Supreme Court of Nevada. The crash occurred while on approach into Los Angeles International in marginal conditions. The defendant obtained a jury verdict and the plaintiffs appealed. The supreme court reversed and stated:

> Wanton reckless disregard could be found by the jury in these facts; as the pilot descended he did so with the knowledge that there was a steadily deteriorating visibility at the airport and that visibility was already below the Federal Aviation Agency minimums, that the Controller would terminate at a point one-half mile from touchdown thereby cutting off communications and guidance, that if he persisted in the approach he would be required to attempt a visual contact and expose himself to disorientation and when queried whether he intended making an approach in this weather he answered, 'Put me right down on the runway.'[308]

There are a few automobile guest cases from states with comparable aviation statutes that may provide strong analogies for diminished standards of care in aviation guest litigation. Two California cases, *Morrison v. Townly*[309] and *Snider v. Whitson*,[310] deal with the training and physical capacity of the operator to safely operate the vehicle. In *Morrison* the driver had been awake twenty-two hours as of the time of the accident, had worked a full eight hour day, had done considerable driving that day, and had fallen alseep at the wheel of the car, thus causing the car to leave the roadway and crash. The *Snider* case involved an elderly woman with reduced vision. The evidence indicated that she was fully aware of her physical limitations, yet she went ahead and invited the guest for a ride. In each of these cases, the court held that there was sufficient evidence to support a finding of "wilful misconduct" under the California automobile guest statute. These cases strongly suggest that if a pilot invites guests aboard knowing that he is suffering from physiological infirmities, then any accidents resulting from those disabilities will not be within the purview of the aviation guest laws.

An Ohio automobile case suggests another analogy. In *Robertson v. Havens*,[311] the court held that the allegations in the complaint were sufficient to raise the issue of the driver's "wilful and wanton misconduct" when they asserted the following facts:

> 1. that a gasket in the exhaust system of the car was defective and was leaking combustion by-products, including carbon-monoxide;
> 2. that this defect was known to the driver;
> 3. that the driver knew that failure to repair the gasket could result in carbon monoxide poisoning of the guest;
> 4. that the driver failed to have the gasket repaired;
> 5. that that driver invited the guest for a ride anyway; and,
> 6. that the guest experienced carbon monoxide poisoning.

Query, would a pilot who knows of dangerous defects in his aircraft that

[307] *Supra* note 303.
[308] *Id.*
[309] 269 Cal. App. 2d 863, 75 Cal. Rptr. 274 (1969).
[310] 184 Cal. App. 2d 211, 7 Cal. Rptr. 353 (1960).
[311] 154 N.E.2d 449 (Ohio App. 1957).

would render the aircraft unsafe or unairworthy, and who goes ahead and uses the aircraft to transport a "guest," be guilty of "wilful and wanton misconduct?"

In regard to the guest statute exceptions based on "gross negligence," "heedlessness or reckless disregard of the rights of others," "wilful and wanton disregard of the rights of others," "wilful and/or wanton misconduct," and "wilful misconduct" there is a very subtle and important element that plaintiffs must show before they may recover from the host. That element is the "intent" or "state of mind" of the host and requires some discussion.

### E. *"Intent" and "State of Mind" of the Host*

As with so many aspects of guest cases, the question of whether a plaintiff must plead and prove a particular state of mind of the host so as to show breach of the appropriate diminished standard of care has been answered in many ways. The various definitions of these diminished standards of care that were discussed earlier all speak in terms of the host "intentionally" doing an act or acting with "conscious" knowledge of the dangers involved or of the probability of injury to the guest. Courts in aviation guest law jurisdictions, in case after case, speak in these terms whenever they are faced with defining these concepts.[312]

The problem appears to be: (1) whether plaintiff must show the actual subjective frame of mind of the host when he committed the casual act, or (2) whether the plaintiff need only show sufficient external and objective facts that the host knew or should have known that would warrant a reasonable man in the circumstances to realize that the causal act involved a high degree of danger.[313] Obviously, if the formtr rule prevailed the plaintiffs in aviation guest cases would have a very tough time indeed.

To begin, it should be noted that it need not be shown that the host intended to injure or kill his guest. That is not necessary in any jurisdiction, although New Mexico comes the closest to requiring it.[314] Some of the earlier guest cases suggested that the plaintiffs had to prove the actual subjective state of mind of the host.[315] New Mexico,[316] North Dakota,[317] Ohio[318] and South Carolina[319] appear to retain this requirement.

But such an approach has been strongly criticized.[320] The better rule, it

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[312] Ferrell, *supra* note 303; Chappell v. Palmer, 236 Cal. App. 2d 34, 45 Cal. Rptr. 686 (1965); Grant v. Clarke, 78 Idaho 412, 305 P.2d 752 (1956); Rowe v. Frazer, 83 Ill. App. 2d 367, 227 N.E.2d 781 (1967); Sausaman v. Leininger, 137 N.E.2d 547 (Ind. App. 1956); Prentkiewicz v. Karp, 375 Mich. 367, 134 N.W.2d 717 (1965); Smith v. Wilson, 78 N.M. 491, 432 P.2d 847 (1967); Holcomb v. Striebel, ___ N.D. ___, 133 N.W.2d 435 (1965); Mitchell v. Brewer, 193 N.E.2d 304 (Ohio App. 1962); Yaun v. Baldridge, 243 S.C. 414, 134 S.E.2d 248 (1964); Minick v. Englert, 167 N.W.2d 551 (S.D. 1969); *see* Comment, 35 MICH. L. REV. 804, 812 (1937).

[313] 2 HARPER & JAMES, THE LAW OF TORTS 954 (1956); Note, *Treadmill to Confusion—Ohio's Guest Statute*, 8 WEST. RES. L. REV. 170, 175, 182 (1957).

[314] *See* Carpenter v. Yates, *supra* note 287, and accompanying text.

[315] *See* 2 HARPER & JAMES, *supra* note 313, for a listing of the cases.

[316] Smith, *supra* note 312, and Carpenter, *supra* note 287.

[317] Holcomb, *supra* note 312.

[318] Mitchell, *supra* note 312; Jenkins v. Sharp, 140 Ohio St. 80, 42 N.E.2d 755 (1942); Thomas v. Foody, 54 Ohio App. 423, 7 N.E.2d 820 (1936).

[319] Yaun, *supra* note 312.

[320] HARPER & JAMES, *supra* note 313; *see also* Note, *supra* note 309.

is argued, is not to require proof of the host's subjective state of mind, but to allow proof of facts either known to the host or that should have been known to him, from which would a reasonable man would realize that the host's causal acts would likely result in danger to the safety of the guest. This is the formula set forth in Section 500 of the Restatement of the Law of Torts, Second. As indicated above, Idaho and Oregon have adopted that formula. Hence, they would appear to have adhered to the more modern objective test. Of the remaining aviation guest law jurisdictions, the following appear to have joined Idaho and Oregon: California,[321] Illinois,[322] Indiana,[323] Michigan,[324] and South Dakota.[325]

One exception found in the aviation guest statutes of seven states is completely objective and requires no showing of the state of mind of the host; i.e., intoxication.

F. *"Intoxication" or "Under The Influence of Intoxicating Liquor"*

Seven states with aviation guest statutes expressly allow a guest to recover from the host where the cause of the aircraft crash is the intoxication of the host. California, Idaho, Nevada, North Dakota, Oregon and Utah rely upon the term "intoxication," while Nebraska employs the phrase "under the influence of intoxicating liquor." Although there may be very subtle semantic differences in the meaning of these provisions, the courts have equated them for purposes of host-guest accident litigation.[326]

There has been reasonably little disagreement about the definition of "intoxication." Generally, the question is:

> Whether the person involved is so far under the influence of intoxicating liquor, or has reached such a degree of intoxication that his ability to operate a car in the manner that an ordinary prundent and cautious person in full possession of his faculties, using reasonable care, would operate or drive a similar vehicle under like conditions.[327]

Although the precise degree of inebriation is relatively unimportant, the normal faculties, either perception, will or judgment, must be sufficiently impaired as to render the host unable to operate the vehicle with the same degree of care or caution characteristic of the sober person of ordinary prudence.[328] Hence, it would appear that a guest could recover from a host, where the host commits an act of ordinary negligence as a result of the influence of alcohol. The Supreme Court of North Dakota has so ruled.[329]

As with other diminished standards of care under the various guest laws, what constitutes intoxication should be defined in terms of the nature of

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[321] Chappell, *supra* note 312.
[322] Rowe, *supra* note 312.
[323] Sausaman, *supra* note 312.
[324] Prentkiewicz, *supra* note 312.
[325] Minick, *supra* note 312.
[326] Smith v. Baker, 14 Cal. App. 2d 10, 57 P.2d 960; Provins v. Bevis, 70 Wash. 2d 131, 422 P.2d 505 (1967).
[327] Tracy v. Brecht, 3 Cal. App. 2d 105, 111-12, 39 P.2d 498, 501 (1934).
[328] Frame v. Grisewood, 81 Nev. 114, 399 P.2d 450 (1965); O'Neill v. Henke, 167 Neb. 631, 94 N.W.2d 322 (1959); Sahli v. Fuehrer, 127 N.W.2d 900 (N.D. 1964).
[329] Brostad v. LaRoque, 98 N.W.2d 16 (N.D. 1959).

the particular activity. This general principle was recognized in *People v. Lopez*:[330]

> . . . the degree of intoxication forbidden in each instance generally would be understood in accordance with the logical demands of the situation. This appears perfectly reasonable, for a man well might be able to comprehend the nature of his acts in obtaining a marriage license in a condition that should absolutely disqualify him to operate an airplane or to mix drugs.

Most definitions of "intoxication" "indicate some relationship between the use of intoxicants and the conduct of the user . . ."[331] in the particular circumstances. Hence, it is suggested that, because of the greater need for presence of mind, body and judgment in the safe operation of aircraft, as compared to automobiles, and the greater risks of more grievious injuries should carelessness occur, the levels of inebriation that would suffice for a showing of "intoxication" in aviation guest litigation should be substantially lower than those found to be sufficient in automobile guest cases. However, we may look to automobile guest cases to set the upper limit of the impermissible level of inebriation. Surely if one is too "intoxicated" to operate an automobile within the provisions of the auto guest laws, he will also be too "intoxicated" to operate an aircraft within the meaning of the aviation guest statutes. On the other hand, auto cases should not set the lowest level of "intoxication" within the meaning of the aviation guest laws.

Where a blood alcohol test has been performed on the host, the question resolves itself into a comparison of numbers. In *Taylor v. Rosiak*,[332] a California court held:

> A person with a blood-alcohol content of .16 per cent is under the influence of intoxicating liquor so as to affect his ability to operate a motor vehicle in the manner of a reasonably prudent person, and is intoxicated. He is physically able to perform the various functions required of the driver of a car and his intoxication may not be apparent to other persons. A person having a blood-alcohol content of .02 per cent is not . . . under the influence of intoxicating liquor.

Another approach to what is the upper level of intoxication in guest cases was suggested by the Nevada Supreme Court in *Downing v. Marlia*.[333] The court referred to the section of the traffic laws which created a legal presumption, for purposes of criminal litigation, that the driver was intoxicated if his blood alcohol level was .15 per cent.[334] California reduced the presumptive level to .10 per cent,[335] and has defined "percent" to mean "grams of alcohol per 100 milliliters of blood."[336] For purposes of host-

[330] 26 Cal. Rptr. 532 (1962). The opinion of the California District Court of Appeals, from which the quotation was taken was vacated upon the granting of a hearing by the Supreme Court. *See* 59 Cal. 2d 653, 381 P.2d 637 (1963). The truth of the general remark remained untarnished by the higher court.

[331] McCoid, *Intoxication and Its Effect Upon Civil Responsibility*, 42 IOWA L. REV. 38, 41 (1956).

[332] 236 Cal. App. 2d 68, 45 Cal. Rptr. 759, 762 (1965).

[333] 82 Nev. 295, 417 P.2d 150, 151 (1966).

[334] NEV. REV. STAT. § 484.055(1)(c).

[335] CAL. VEHICLE CODE, § 23126(a)(3), *as amended* (1969).

[336] *Id.*

guest litigation these presumptive levels of intoxication can be helpful in establishing the level beyond which there should be no doubt about the incapacity of the host. However, they should not be used to establish the lowest level of intoxication that would suffice under the various guest statutes to impose liability upon the host. Research has been conducted to determine at what minimum percentage of blood alcohol saturation a person's judgment and perception become affected.[337] It has been suggested that an airman's judgment may be affected when the level is as low as .05 percent.[338]

Finally, it should be carefully noted that if the pilot survives the crash, his blood alcohol level will not remain constant with time. It is his level at or just prior to the crash that is determinative. In *Taylor v. Rosiak*,[339] the Court recognized that physiological variable to be considered:

> A blood-alcohol content varies according not only to the amount and potency of the beverage consumed, but with the rate of consumption, inasmuch as there is a reduction in blood-alcohol content of approximately .015 or .02 per cent per hour. The maximum effect of the consumption of alcoholic beverage upon the blood-alcohol content is within one-half to three-quarters of an hour after consumption, if the person does not have food in his stomach; otherwise, the period is longer.

There appears to have been very little litigation of this issue heretofore in cases arising from aircraft accidents. *Broyles v. Jess*[340] is the only reported case involving aviation guest laws where intoxication of the pilot was demonstrated. He had a blood-alcohol level of .105 per cent. Unfortunately, the case turned upon the relationship between the pilot and the corporation that owned tht aircraft, and there was no discussion of whether the pilot was "intoxicated" within the meaning of the California aviation guest statute.

The sole remaining execption to aviation guest statutes is where the accident was "intentional" on the part of the pilot or owner.

### G. *"Intentional"*

Delaware, Idaho, New Mexico, Oregon and South Carolina allow recovery by a guest if it is shown that the aircraft accident was "intentional." Each of those jurisdictions provide recovery upon a showing of a lesser diminished standard of care. As a practical matter, therefore, a guest would not be put to the very heavy burden of showing that, in essence, the pilot or the owner had committed an intentional tort. For that reason, an extended discussion of what constitutes this exception is not warranted. This conclusion is supported by the fact that in those jurisdictions the issue has been virtually not litigated at all.[341]

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[337] Mohler, Berner, and Goldbaum, *Alcohol Question in Aircraft Accident Investigation*, AEROSPACE MED. 1228-30 (Nov. 1968); Davis, *Alcohol and Military Aviation Fatalities*, AEROSPACE MED., 869-72 (Aug. 1968).

[338] *Alcohol and Air Accidents*, THE AIR LINE PILOT, 32-33 (Dec. 1969).

[339] *Supra* note 332.

[340] 201 Cal. App. 2d 841, 20 Cal. Rptr. 355 (1962).

[341] Fulghum v. Bleakley, 177 S.C. 286, 181 S.E. 30 (1935) is the only reported case this writer could locate on the point. There, the court defined "intentional" as causing the wrongful act purposely, willfully or designedly.

Now that the guest has come forward with the evidence of his status and the aggravated misconduct of the host, there are affirmative defenses available to the host in an aviation guest case.[342]

## VI. Affirmative Defenses

### A. *Introduction*

As in other tort litigation, the defendant has available certain affirmative defenses in aviation guest cases. There appears to be some confusion over the most accurate terminology to be applied. In part, the problem was and is caused by the failure of the legislatures to define what affirmative defenses apply in automobile and aviation guest cases. However, there seems to be some consensus on what type of conduct on the part of the guest will suffice to bar recovery. Generally, the available affirmative defenses are: (1) contributory negligence, (2) comparative negligence, and (3) assumption of risk.

### B. *Contributory Negligence*

Arkansas,[343] California,[344] Illinois,[345] Indiana,[346] Nevada,[347] North Dakota,[348] Ohio,[349] South Carolina,[350] and Utah[351] have squarely held that ordinary contributory negligence is not a bar to recovery by the guest from a host who has committed the appropriate aggravated misconduct. However, if the guest committed wrongful acts of the same degree of culpability as those of the host, such as contributory wilful and wanton misconduct, then recovery would be denied in those jurisdictions.[352]

Idaho appears to be in harmony with the majority. In *Loomis v. Church*[353] the court held:

> . . . ordinary contributory negligence is not a defense in an action based upon reckless disregard of the rights of others under our guest statute.

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[342] *See* Hardman, *Aviation Guest Statutes*, Ins. L.J. 561, 564, 567 (1962).

[343] Roberts v. Commercial Standard Ins. Co., 138 F. Supp. 363, 375 (W.D. Ark. 1956).

[344] Williams v. Carr, 68 Cal. 2d 920, 440 P.2d 505, 511 (1968).

[345] Lessen v. Allison, 25 Ill. App. 2d 395, 166 N.E.2d 806, 809-10 (1960); Robinson v. Workman, 15 Ill. App. 2d 25, 145 N.E.2d 265 (1957); Schultz v. Stephan, 8 Ill. App. 2d 563, 132 N.E.2d 30 (1956); Valentine v. England, 6 Ill. App. 2d 275, 127 N.E.2d 473, 474-75 (1955); *see also* Comment, *The Illinois Guest Statute: An Analysis and Reappraisal*, 54 Nw. U. L. Rev. 263, 267, n.19 (1959); Huff, *Basis of Liability in Automobile Cases*, 1953 Ill. L. Forum 28, 40.

[346] Pierce v. Clemens, 113 Ind. App. 65, 46 N.E.2d 836, 840 (1942); Hoeppner v. Saltzgaber, 102 Ind. App. 458, 200 N.E. 458, 464 (1936); Coconover v. Stoddard, ___ Ind. App. ___, 182 N.E. 466 (1932); *see also* Harper, *Development in the Law of Torts in Indiana*, 21 Ind. L.J. 447, 451 (1946); Lowe, *Suggestions for the Trial of Auto Damage Suits*, 16 Ind. L.J. 286, 293 (1940); Appleman, *Wilful and Wanton Conduct in Automobile Guest Cases*, 13 Ind. L.J. 131, 145 (1937-38); Note, 34 Ind. L.J. 338, 349 (1958).

[347] Downing v. Marlia, 82 Nev. 294, 417 P.2d 150, 153 (1966); Ormand v. Brehm, 82 Nev. 143, 413 P.2d 493, 495 (1966).

[348] Ledford v. Klein, 87 N.W.2d 345, 352 (N.D. 1957).

[349] Melville v. Greyhound Corp., 94 Ohio App. 258, 115 N.E.2d 42, 45-46 (1953); Gill v. Arthur, 69 Ohio App. 386, 43 N.E.2d 895, 898 (1941); Haacke v. Lease, 41 N.E.2d 590, 596 (Ohio App. 1941).

[350] Hiott v. Bishop, 244 S.C. 524, 137 S.E.2d 780, 783 (1964); Lynch v. Alexander, 242 S.C. 208, 130 S.E.2d 563, 565 (1963).

[351] Roylance v. Davies, 18 Utah 2d 395, 424 P.2d 142, 146 (1967).

[352] Williams, *supra* note 344; Vallentine, *supra* note 345; Pierce, *supra* note 346; Ormand, *supra* note 347; Lynch, *supra* note 350; *see also* Weber, *Guest Statutes*, 11 U. L. Rev. 24, 57 (1937).

[353] 76 Idaho 87, 277 P.2d 561, 564 (1954).

*Loomis* was reaffirmed in *Smith v. Sharp*.[354] However, in *Hayslip v. George*,[355] the same court stated that:

> . . . as a general rule a guest passenger must pay such attention to his own welfare as a reasonably prudent person would under like circumstances.

The apparent conflict is somewhat ameliorated when the language is put in the factual context. The defense's theory was that the guest failed to protest and take action to evacuate the vehicle upon becoming aware of the danger created by the misconduct of the driver. As we shall see below, this defense is very much like the defense of assumption of a known risk, in that it does not involve affirmative acts of misconduct by the guest which contribute to the cause of the accident.

Opinions in Georgia,[356] Nebraska,[357] New Mexico,[358] and Oregon[359] refer to the terminology of "contributory negligence," but also appear to be talking about assumption of risk. For example, the Georgia court, in dealing with a situation where the guests accepted a ride in the host's aircraft knowing of dangerous flying conditions, used the term "negligence" in regard to the guest's conduct. Similarly the courts in Nebraska, New Mexico and Oregon were faced with a record that indicated that the host was physically incapacitated for one reason or another, yet the guests either accepted a ride or continued to ride with the host. The misconduct of the guest in each case was voluntarily placing himself in a place of known or clearly knowable danger, and not committing acts that contributed to the cause in fact of the crash. Be that as it may, the Oregon court goes so far as to expressly reject the "assumption of risk" designation for such acts by the guests and refers to them as "contributory negligence."

Whatever tht label that is used, the bulk of the cases deal with either accepting a ride with a host who is known to be incapable of safely operating the vehicle or remaining in the vehicle after such incapacity is manifested by the host's conduct and the guest's failure to protest and/or remove himself from the vehicle.

As to what will suffice to show that the guest committed acts of misconduct equal in their culpability to those of the host, we must again refrain from generalization. Each case is sui generis and only broad outlines can be suggested. Where the guest participates in the previous activities of the host, such as a drinking party that renders the host incapable of safely operating the vehicle, the guest has been held guilty of contributory wilful misconduct.[360] Apparently the acts of the guest contributed to the cause of the crash in that they contributed to the incapacity of the host.

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[354] 85 Idaho 17, 375 P.2d 184, 194 (1962).

[355] 92 Idaho 349, 442 P.2d 759, 763 (1968).

[356] Huguley, *supra* note 271.

[357] Kaufman v. Tripple, 180 Neb. 593, 144 N.W.2d 201, 206 (1966).

[358] Perini v. Perini, 64 N.M. 79, 324 P.2d 779, 780 (1958).

[359] Zumwalt v. Lindland, 239 Ore. 26, 396 P.2d 205, 207 (1964).

[360] Godinez v. Soares, 216 Cal. App. 2d 145, 30 Cal. Rptr. 767 (1963); Smith v. Maloney, 26 Cal. App. 2d 97, ___ P.2d ___ (1938); Schneider v. Brecht, 6 Cal. App. 2d 379, ___ P.2d ___ (1935).

Conceptually these cases seem to be very near the theory of assumption of a known risk.

One aviation guest law state, South Dakota, expressly provides in its statute that "no person so transported shall have such a cause of action if he has . . . by want of ordinary care brought the injury upon himself." Thus, South Dakota clearly bars recovery to the guest upon a showing of ordinary contributory negligence even though the host was guilty of "willful and wanton misconduct."

### C. *Assumption Of Risk*

There appears to be no dissent among the aviation guest law jurisdictions from the rule that if a guest has knowledge of dangers or risks to be encountered in riding with the host and yet either accepts or continues the ride voluntarily, without protest, he will be barred from recovery no matter how culpable the host may be. Many courts label this defense "assumption of risk."[361] The elements of this defense are:[362]

1. The guest had a knowledge and appreciation of the dangers and risks;
2. The guest had a reasonable opportunity to make an alternative choice; and,
3. The guest voluntarily placed himself in a position of danger.

Where the danger or risk does not become known until after the ride begins, however, the host must go one step further in his proof of assumption of risk. The rule was well stated in *Lynch v. Alexander*:[363]

> The test . . . is not whether a guest knowing that the driver's conduct is improper, has a reasonable opportunity to leave the automobile, but whether a reasonable opportunity being afforded, a person in the exercise of ordinary care would have done so under the circumstances.

Finally, the host has the burden of showing that the specific risk assumed was the one that caused the accident.[364]

Neither time nor space are presently available to discuss specific factual situations that have supported the doctrine of "assumption of risk" in aviation accident litigation in general.[365] There appears to be no reason why those rules should not be applicable in aviation guest cases.

There is one additional doctrine in some aviation guest law states that wears the cloak of an affirmative defense, but tends to be more of a means

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[361] Roberts v. Commercial Standard Ins. Co., 138 F. Supp. 363, 375 (W.D. Ark. 1956); Scott v. Shairrick, 225 Ark. 59, 279 S.W.2d 39, 42 (1952); Cooke v. Stevens, 191 Cal. App. 2d 457, 12 Cal. Rptr. 828, 829 (1961); Ward v. Knapp, 134 Cal. App. 2d 538, 286 P.2d 370, 372 (1955); Ridgway v. Yenney, 223 Ind. 16, 57 N.W.2d 581, 583 (1944); Pierce, *supra* note 346; O'Brien v. Anderson, 177 Neb. 635, 130 N.W.2d 560, 567 (1964); Downing, *supra* note 347; Gill, *supra* note 349; Benton v. Davis, 248 S.C. 402, 150 S.E.2d 235, 237 (1966); Jacques v. Farrimond, 14 Utah 2d 166, 380 P.2d 133, 134 (1963); *see also* Pedrick, *Taken For a Ride: The Automobile Guest and Assumption of Risk*, 22 LA. L. REV. 90, 93-94 (1961); for a good discussion of the historical background and development of the doctrine of assumption of risk, *see* Rice, *The Automobile Guest and the Rationale of Assumption of Risk*, 27 MINN. L. REV. 323, 324-34 (1943).

[362] O'Brien and Jacques, *supra* note 361.

[363] *Supra* note 350, at S.E.2d 566; *see also* Singleton v. Hughes, 245 S.C. 169, 139 S.E.2d 747 (1965); Jackson v. Jackson, 234 S.C. 291, 108 S.E.2d 86 (1959).

[364] In Re Kinsey's Estate, 152 Neb. 95, 40 N.W.2d 526, 534 (1949).

[365] *See* 8 AM. JUR. 2d, AVIATION, § 87, at 713-14 (1963).

of apportioning damages according to relative fault; i.e. comparative negligence.

### D. *Comparative Negligence*

Four aviation guest law jurisdictions have adopted, either by statute or by case law, the doctrine of comparative negligence. Arkansas,[366] Nebraska,[367] and South Dakota[368] have done so by statute, while Georgia[369] has done so by judicial decisions.

All three comparative negligence statutes expressly limit their application to actions based on "negligence." The question thus arises: Do these statutes apply to aviation host-guest litigation? In Nebraska the answer is clearly in the affirmative.[370] However, it should be noted that the exception provided in the Nebraska automobile and aviation guest statutes is based on the gross negligence of the host. And since Georgia also predicates recovery by a guest upon gross negligence, it would seem that the rule in Nebraska should apply.

The question becomes more difficult when recovery by the guest is based upon the wilful or wanton misconduct of the host. Such is the situation in Arkansas and South Dakota. The latter jurisdiction has resolved the issue by expressly providing in its automobile[371] and aviation guest statutes that the guest shall not recover if he brought the injury upon himself "by want of ordinary care."

The Arkansas statutes do not have a similar provision. Therefore, since a guest must show that the host wilfully and wantonly operated the aircraft in disregard of the rights of others, and since that standard is not a form of "negligence" as continued in the statute, it could be strongly argued that the prorata damage apportionment authorized by the comparative negligence statutes would not apply to aviation guest cases. The issue does not appear to have been determined by an appellate court.[372] Although it has been held that ordinary contributory negligence is not a bar to recovery from the host for his wilful and wanton disregard for the rights of the guest,[373] that would not authorize pro rata reduction of damages based on the ratio of aggravated fault between the guest and host. Such a strict and literal construction of the Arkansas comparative negligence statute would defeat the obvious Legislative intention to apportion damages along the lines of fault allocation.

No discussion of the impact of guest laws upon aviation accident litiga-

[366] ARK. STAT. ANN. §§ 27-1730.1, 27-1730.2 (1947).

[367] NEB. REV. STAT. § 25-1151 (1943).

[368] S.D. COMP. LAWS § 20-9-1 (1967).

[369] Whatley v. Henry, 65 Ga. App. 668, 16 S.E.2d 214, 220 (1941); Lewis v. Powell, 51 Ga. App. 129, 179 S.E. 865, 867-68 (1935).

[370] Hess v. Holdsworth, 176 Neb. 774, 127 N.W.2d 487, 493-94 (1964); Landrum v. Roddy, 12 N.W.2d 82, 88 (Neb. 1943); *see also* 149 A.L.R. 1050 (1944); Gradwohl, *Comparative Negligence of an Automobile Guest-Apportionment of Damages Under the Comparative Negligence Statute*, 33 NEB. L. REV. 54 (1953).

[371] S.D. COMP. LAWS § 32-34-2 (1967).

[372] The general relationship between these two statutes is discussed in Leflar, *Comparative Negligence—A Survey For Arkansas Lawyers*, 10 ARK. L. REV. 54, 61-62 (1955-56). This particular point was not raised.

[373] *Supra* note 343.

tion would be complete without consideration of the wisdom of such rules of law.

## VII. REPEAL

The history of aviation guest law must be examined together with the emergence of identical doctrines in automobile accident litigation. It is obvious that sixteen Legislatures in automobile guest statute jurisdictions could not resist the sweet smell of symmetry. They rushed in and engrafted on aviation accident litigation their automobile guest laws. Clearly they were assisted in this decision by the liability insurance lobbies in the various states.[374] These "legislative advocates" were well financed and organized and obtained their objective without opposition from any group representing the wrongfully injured or killed.[375] Consequently, there was very little deliberate thought given to the wisdom and impact of such statutes; nor was there much analysis of the alleged socio-economic reasons for these statutes. The liability insurance lobbyist pointed the finger of moral blame at the ever growing class of "hitchhikers" during the Great Depression and contended that these unworthy vagabonds should not be allowed to bite the hand of the friendly host who stopped to give them a life and then ran them into a tree. Dean Prosser has observed:

> In legislative hearings there is frequent mention of the hitch-hiker, who gets little sympathy. The writer once found a hitch-hiker case, but has mislaid it. He has been unable to find another.[376]

Such was the beginning of the rationale for the first purpose to be served by guest statutes; i.e. one should not be allowed to sue someone who gives him a free ride even though injury or death resulted from the benefactor's carelessness.

The logic and persuasiveness of this argument clearly fails when the real party in interest is the liability insurer of the host.[377] The insurer has conferred no gratuity. To the contrary, it has exacted from the host a money payment to protect him from liability.

Without regard to the presence of an insurer, the lack of soundness of this sophistry was exposed by the Supreme Court of New Jersey in *Cohen v. Kaminetsky*:[378]

> It sometimes is suggested that the recipient of a favor should be more grateful. *The short answer is that the favor is hardly worth the price* exacted from the injured in thus absolving the wrongdoer.

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[374] Clark v. Clark, 107 N.H. 351, 222 A.2d 205, 210 (1966); A. EHRENZWEIG, CONFLICT OF LAWS 579 (1962); W. PROSSER, TORTS 190-91 (3d ed., 1964); Lascher, *Hard Laws Make Bad Cases—Lots of Them (The California Guest Statute)*, 9 SANTA CLARA LAWYER 1, 10 (1968); Pedrick, *Taken For a Ride: The Automobile Guest and Assumption of Risk*, 22 LA. L. REV. 90, 91 (1961); Tipton, *Florida's Automobile Guest Statute*, 11 U. FLA. L. REV. 287 (1958).

[375] Lascher, *supra* note 374, at 92.

[376] PROSSER, *supra* note 374, at 191, n.83.

[377] Ehrenzweig, *supra* note 374, at 577; Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law Process*, 46 TEX. L. REV. 141, 173 (1967); Note, *The Ohio Guest Statute*, 10 U. CIN. L. REV. 289, 303-04 (1936).

[378] 36 N.J. 276, 176 A.2d 483, 487 (1961).

When one considers the horrendous injuries and frequent death that result from the typical crash of an aircraft, it becomes ludicrous to say that the pilot should be protected from his carelessness because, after all, the ride was free. Once again Dean Prosser has put his finger on the truth:

> Essentially, however, the theory of the acts is that one who receives a gratuitous favor in the form of a free ride has no right to demand that his host shall exercise ordinary care not to injure him. The typical guest case is that of the driver who offers his friend a lift to the office or invites him out to dinner, negligently drives him into a collision, and fractures his skull—after which the driver and his insurance company take refuge in the statute, step out of the picture, and leave the guest to bear his own loss. If this is good social policy, it at least appears under a novel front.[379]

The second reason advanced for the wisdom of guest statutes is that hosts and guests are often family members or close friends and conspire to defraud insurance companies.[380] Although there was much discussion about such collusive suits and how they were clogging the courts with useless lawsuits, the liability insurance industry apparently never has tabulated the actual number of such suits. If such empirical data exists, it has been retained by the insurers. One gets the definite impression that such conspiracies were more of a myth than a reality.

This second rationale has been repeatedly discredited by the courts and legal writers.[381] It assumes that most guests and hosts are evil-doing frauds just waiting to conspire. This runs counter to the phychological phenomena that most people in our society are an honest and fair minded lot. Indeed our whole jurisprudential and commercial fabric is built on that assumption.

Hence, just and meritorious claims are rejected simply "to protect insurance companies from fraud and collusion."[382] "The interest of the public is to be balanced against that of the insurance companies. . . . The interests of many should not be penalized to protect against the alleged evil design of a few."[383]

It has not been explained how these statutes in fact prevent collusive claims by those who are determined to defraud an insurance company.[384] The courts have not taken kindly to the implied indictment of the ability of the judicial process to discover the truth:

> Nor are we impressed with the further thought that the prospect of collusion should lead to a different standard of care. We see no inevitable connection between the subjects. *It is the regular business of the courts to find the truth.*[385]

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[379] PROSSER, *supra* note 374, at 191.

[380] *Id.* note 29.

[381] Klein v. Klein, 58 Cal. 2d 692, 696, 376 P.2d 70 (1962); Cohen, *supra* note 378; Ehrenzweig, *supra* note 374, at 578; Lasher, *supra* note 374, at 20; Hardman, *supra* note 342, at 562; Comment, *The Case Against the Guest Statute*, 7 WM. & MARY L. REV. 321, 328 (1966); Comment, *The Illinois Guest Statute: An Analysis and Reappraisal*, 54 NW. U. L. REV. 263, 273 (1959); Note, 1 WYO. L.J. 182, 186 (1947); Note, *supra* note 377, at 306-07.

[382] Note, 1 WYO. L.J. 182, 186 (1947).

[383] *Id.*

[384] Cohen, *supra* note 378, at A.2d 487; Lascher, *supra* note 374; Hardman, *supra* note 342, at 562.

[385] Cohen, *supra* note 381.

> It would be a sad commentary on the law if we were to admit that the judicial processes are so ineffective that we must deny relief to a person otherwise entitled simply because in some future case a litigant may be guilty of fraud or collusion. Once that concept were accepted, then all causes of action should be abolished. *Our legal system is not that ineffectual.*[386] (Emphasis added.)

Further, if both host and guest are not to be stopped by concerns of conscience, then why could they not fabricate "payment" or "compensation" under these statutes with as equal ease as they allegedly made up "simple negligence" under the common law?

Surely liability insurance companies, their investigators and trial attorneys are capable of taking care of themselves. They are at the scene of the accident at a very early time. They have the facts long before any lay host or guest could possibly know what facts to manufacture to establish negligence, assuming the conspiracy emerges after the accident. The thought of two people in an aircraft conceiving such a plot before the event is simply absurd.

Hence, before such a fraud can be effective, the scheme must withstand the investigation of the insurer's accident investigators, the cross examination of attorneys for the insurer, the trial process and the appellate courts. That is too great a burden for laymen. Yet on the basis of this myth, many innocent and grievously injured guests must go uncompensated.

One final argument is made in support of guest statutes, automobile and aviation; i.e. they reduce liability insurance premiums. This argument raises the whole subject of the validity of such rules of law in our modern socio-economic circumstances, for clearly our jurisprudence must make social and economic sense to the people.[387] First, do guest statutes, either automobile or aviation, reduce insurance premiums? Various writers have compared the liability insurance rates in guest-statute and no-guest-statute jurisdictions.[388] The rates are not directly related to the existence of guest statutes:

> One can only conclude that liability insurance rates, which not only may vary widely from one state to another having similar laws but also in various territories within individual states, are determined primarily if not entirely by factors other than the presence or absence of guest statutes.[389]

Another writer concluded that the argument has but limited validity:[390]

> . . . rates in New York, which has no guest statute or common-law guest rule, are lower than the rates in Massachusetts, which does. The state with the lowest rates in New England is Maine; it has no restrictions on guests. The average annual automobile-liability policy costs in the twenty-one no-guest-rule states is $67.75 and in the twenty-nine guest-rule states $58.03.

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[386] Klein, *supra* note 381.

[387] Allen, *Why Do Courts Coddle Insurance Companies?*, 61 AMER. L. REV. 77, 88 (1927).

[388] Joost, *The Automobile Guest Rule: Sound Public Policy or Legal Dinosaur?*, 2 PORTIA L.J. 105, 115-16 (1966); Tipton, *Florida's Automobile Guest Statute*, 11 U. FLA. L. REV. 287, 305 (1958); Comment, *supra* note 381, at 7 WM. & MARY L. REV. 327-28.

[389] Tipton, *supra* note 388, at 306.

[390] Joost, *supra* note 388, at 112-13.

These figures would indicate that at the very worst, rates would be increased by less than $10.00 per year! What a small price to take care of a friend—who would not pay it?

The argument that if insurance premiums are to go up, then let us keep laws that deprive innocent victims of wrongdoing from recovery is morally barbaric. For a soft piece of gold or silver in our pocket, we will wrongfully maim or kill our family and friends without compensating them so they can rebuild their lives. The moral fiber of the American people is capable of a more humane rule.

There is no reason to believe the situation is any different in aviation. An aircraft can cross state boundaries with impunity. On any given flight, it may fly over guest-law states. Thus, rates must be set with the very real probability in mind that the guest law of the state where the aircraft is based will not apply. This is particularly true when one remembers that only seventeen states in the United States have aviation guest laws.

If we assume that insurance premiums will increase if aviation guest laws are repealed, the question is whether or not that would be a better order for society. Since it is safe to assume that human losses from carelessness in the operation of aircraft will not be eradicated, the question becomes: Is it better to distribute these losses broadly among the class of owners and users of aircraft or should they be borne solely by the innocent victims or their heirs? The better answer is:

> If experience shows that insurance rates are higher in states where a statute does not limit the common law liability, it does not follow that such increased rates should be a deciding factor in determining the duty a driver owes to his guest. From a sociological view-point, it may be that the public good would be better served by having the loss to the injured passenger shared by the automobile-owing public rather than borne by the injured person alone.[391]

No one can question the proposition that the liability insurance industry is in a much better financial position to withstand these losses than is the class of victims.[392] Such a system is consistent with modern concepts:

> It is the principle job of tort law today to deal with these losses. The best and most efficient way to do this is to assure accident victims of compensation, and to distribute the losses involved over society as a whole or some very large segment of it.
>
> * * * *
>
> Of prime importance is the fact that wherever there is widely held insurance, tort liability no longer merely *shifts* a loss from one individual to another but it tends to *distribute* the loss according to the principles of insurance, and the person nominally liable is often only a conduit through whom this process of distribution starts to flow.[393]

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[391] Mundt, *The South Dakota Automobile Guest Statute*, 2 S.D. L. REV. 70, 75 (1957); *see also* Pedrick, *supra* note 370, at 103-04; Gregory, *Gratuitous Undertakings and the Duty of Care*, 1 DE PAUL L. REV. 30 (1951); Comment, *The Liability of an Automobile Driver to a Non-Paying Passenger*, 20 VA. L. REV. 326, 333 (1933).

[392] James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1947).

[393] *Id.* at 550-51. *See also* Leflar, *Conflicts Law: More On Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1595 (1966).

Virtually every writer agrees that guest statutes are a hangover from an earlier set of socio-economic conditions that no longer prevail.[394] The conditions have changed and so must the law if we are to improve our jurisprudence and the society it is supposed to serve. These statutes have had a deplorable impact upon the administration of justice. Again we can turn to Dean Prosser:

> There is perhaps no other group of statutes which have filled the courts with appeals on so many knotty little problems involving petty and otherwise entirely inconsequential points of law.[395]

Appellate Court opinions dealing with issues peculiar to guest cases in jurisdictions with aviation guest laws would fill many many volumes. In California, for example, prior to 1968 there were 201 appeals where one of the guest statutes played a pivotal role.[396] The problem doesn't stop there:

> According to the latest report of the California Judicial Council, the average number of civil dispositions per California appellate justice is approximately 43 per year. In other words, the state has expended five judge-years on working out the knotty, inconsequential little problems attendant upon stamping out ingratitude and burning down the barn to prevent collusion. This is not only a human and intellectual extravagance but also a considerable economic waste. If the ratio of approximately 125 civil dispositions by the superior court to every appellate civil disposition holds true in the area of Guest Act litigation, it may be assumed that the superior courts have been required to dispose of some 25,000 Guest Act cases to date.[397]

This expenditure of time, effort and money by our legal system would be endurable if it were for some high purpose. But, when one realizes that it is caused by laws that were lobbied through state Legislatures by a very powerful economic interest group for the purpose of depriving innocent victims of fair and adequate compensation for their wrongfully inflicted injuries, one cannot help being disguested. Further, guest laws cripple the process of settlement outside the courtroom. The insurer knows that he stands a better chance of not having to pay for wrongfully inflicted injuries if he forces every case into the trial and appellate courts.

Finally, these statutes have lead to confusing definitions and subtleties.[398] There is no certainty of what the law happens to be in any given case. They have reintroduced the concept of varying degrees of negligence, which has been thoroughly repudiated.[399] In a dissent a member of the Oregon Supreme Court stated the existing situation in very frank terms:

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[394] Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579, 586-87 (1968); Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664, 676 (1967); CAVERS, THE CHOICE OF LAW PROCESS 297-98 (1965); Lasher, *supra* note 374, at 10.

[395] PROSSER, *supra* at 374.

[396] Lasher, *supra* note 374, at 24.

[397] *Id.*

[398] Stevens v. Stevens, 355 Mich. 363, 94 N.W.2d 858, 861 (1959); Turner v. McCready, 190 Ore. 28, 222 P.2d 1010, 1018 (1950); Appleman, *Guest Cases in Aviation Law*, 9 AIR L. REV. 30 (1938); Corish, *The Automobile Guest*, 14 Bos. U. L. REV. 728, 729 (1934); Note, 42 VA. L. REV. 97, 101 (1956).

[399] Mayer v. Puryear, 115 F.2d 675, 678 (4th Cir. 1940); Elliott, *Degrees of Negligence*, 6 S. CAL. L. REV. 91, 134-35 (1933); Note, 34 U. DET. L.J. 169, 170 (1956); Note, 33 ORE. L. REV. 216, 218 (1954); Note, 10 U. CIN. L. REV. 289, 290 (1936).

> The basic issue that I come to is: If the guest act has become, as it appears to be, unworkable and incapable of sensible application, we should say so. We should not wait for a harried legislature to relieve the courts of the state of an intolerable burden that results in more injustice than justice.[400]

We have come the full circle:

Polonius: "What do you read, my lord?"

Hamlet: "Words, words, words."

# APPENDIX

## ARKANSAS

ARK. STAT. ANN. § 75-913 (1947)

"No person transported as a guest in any automotive vehicle upon the public highways or in aircraft being flown in the air, or while upon the ground shall have a cause of action against the owner or operator of such vehicle, or aircraft, for damage on account of any injury, death or loss occasioned by the operation of such automotive vehicle or aircraft unless such vehicle or aircraft was wilfully and wantonly operated in disregard of the rights of the others."

The term guest as used in this act shall mean self-invited guest or guest at sufferance.

## CALIFORNIA

CAL. VEH. CODE § 17158 (West 1966).

"A guest riding in or upon any aircraft without giving compensation, or any other person, does not have any right of action for civil damages against the airman flying the aircraft or against any other person otherwise legally liable for the conduct of the airman, on account of personal injury to, or the death of, the guest during such ride, unless the plaintiff in the action establishes that the injury or death proximately resulted from the intoxication or wilful misconduct of the airman."

## DELAWARE

DELAWARE CODE ANN. § 1601 (1953).

(a) "No person transported by the owner or operator of a motor vehicle, boat, airplane or other vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident was intentional on the part of such owner or operator or was caused by his wilful and wanton disregard of the rights of others."

(b) "The provisions of subsection (a) of this section shall not relieve a public carrier, or any owner or operator of a motor vehicle while the vehicle is being demonstrated or a prospective purchaser, of responsibility for any injuries sustained by a passenger being transported by such public carrier or by such owner or operator."

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[400] Burghardt v. Olson, 223 Ore. 155, 354 P.2d 871, 881 (1960).

## GEORGIA

In *Sammons v. Webb*, 86 Ga. App. 382, 71 S.E.2d 832 (1952), Georgia has applied to aircraft accidents the minority Massachusetts rule which requires a guest to show gross negligence.

## IDAHO

IDAHO CODE § 21-212 (1949):

"No person transported by the owner or operator of any aircraft as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by his intoxication or gross negligence."

## ILLINOIS

ILL. ANN. STAT. ch. 15 1/2, § 22.83 (1961):

"No person riding in an aircraft as a guest, without payment for the ride, nor his personal representative in the event of the death of such guest, shall have a cause of action against any airman of such aircraft or its owner or his employee or agent for injury, death or loss, in case of accident, unless the accident was caused by the wilful and wanton misconduct of the airman of such aircraft or its owner or his employee or agent and unless such wilful and wanton misconduct contributed to the injury, death or loss from which the action is brought."

## INDIANA

IND. STAT. § 14-924 (1964):

"The owner, operator or person responsible for the operation of an aircraft shall not be liable for loss or damage arising from injuries to or death of a guest, while being transported without payment therefore, in such aircraft, resulting from the operation thereof, unless such injuries or death are caused by the wanton or wilful misconduct of such operator, owner, or person responsible for the operation of such aircraft."

## MASSACHUSETTS

In *Massaletti v. Fitzroy*, 228 Mass. 487, 118 N.E. 168 (1917), the Supreme Judicial Court held that an automobile guest must show gross negligence before recovering money damages. It appears that Massachusetts has not squarely decided whether this shall be the rule in aviation accidents. In *Wilson v. Colonial Air Transport, Inc.* 278 Mass. 420, 180 N.E. 212 (1932), the court stated in dicta that the rules of law involving torts on land would be applicable to torts in the air. In *Walthew v. Davis* 201 Va. 557, 561, 562, 111 S.E.2d 784 (1960), however, the court stated that in its opinion Massachusetts would not apply the *Massaletti* rule to aviation.

## MICHIGAN

MICH. COMP. LAWS § 259.180(a) (1967):

"No person transported by the owner or operator or the person responsible for the maintenance or use of any aircraft as a guest without payment

for such transportation shall have a cause of action for damages against tht owner or operator or person responsible for the maintenance or use of the aircraft for injury, death or loss, in case of accident, unless the accident shall have been caused by the gross negligence or wilful and wanton misconduct of the owner or operator or the person responsible for the maintenance or use of the aircraft, and unless the gross negligence or wilful and wanton misconduct of the owner or operator or the person responsible for the maintenance or use of the aircaft contrributed to the injury, death or loss for which the action is brought."

(2) " 'Guest' means any person other than an employee of the owner or registrant of the aircraft, or of a person responsible for its operation with the owner's or registrant's express or implied consent, being in or upon, entering or leaving the same, except any passenger for hire and except any passenger while the aircraft is being used in the business of demonstrating or testing. The sharing of expense shall not constitute a carriage for hire within the meaning of this act."

(3) " 'Person or organization responsible for the maintenance or use of an aircraft' shall not include a mechanic who has performed work on or furnished materials, supplies or equipment for an aircraft or any employee of the mechanic when the mechanic is an independent contractor."

## NEBRASKA

NEB. REV. STAT. § 3-129.01 (1967):

"The owner or operator of any aircraft shall not be liable for any damages to any passenger or person riding in such aircraft as a guest or by invitation and not for hire, unless such damage is caused by the pilot of such aircraft being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such aircraft. For the purpose of this section, the term guest is hereby defined as being a person who accepts a ride in any aircraft without giving compensation therefore, but shall not be construed to apply to or include any such passenger in any aircraft being demonstrated to such passenger as a prospective purchaser."

## NEVADA

NEV. REV. STAT. § 41.190 (1967):

"No person riding in an aircraft as a guest within or above the State of Nevada, without payment for the ride or transportation, nor his personal representative, in the event of the death of such guest, shall have a cause of action against any pilot or crewman or such aircraft, or its owner or his employee or agent, for injury, death or loss sustained while so riding as a guest unless the proximate cause of the injury, death or loss was the intoxication, willful misconduct or gross negligence of the pilot, crewman, owner or employee or agent of the owner."

## NEW MEXICO

N.M. STAT. § 44-1-16 (1953):

"No person riding in an aircraft as a guest, without payment for the ride

or transportation, nor his personal representative in the event of the death of such guest, shall have a cause of action against any pilot or crewman of such aircraft or its owners or his employee or agent for injury, death, or loss which occurs as a result of an accident unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others."

NORTH DAKOTA

N.D. CENT. CODE § 2-03-14 (1959):

"No person transported by the owner or operator of any aircraft as a guest without payment for such transportation shall have a cause of action for damages against the owner or operator for injury, death or loss in case of accident, unless the accident shall have been caused by the gross negligence, intoxication or willful and wanton misconduct of the owner or operator of the aircraft, and unless the gross negligence, intoxication or willful and wanton misconduct of the owner or operator of the aircraft contributed to the injury, death or loss for which the action is brought. For purposes of this section, the word "guest" means any person other than an employee of the owner or registrant of any aircraft, or of a person responsible for its operation with the owner's or registrant's express or implied consent, being in or upon, entering or leaving the same, except any passenger for hire and except any passenger while the aircraft is being used in the business of demonstrating or testing. The sharing of expense shall not constitute a carriage for hire within the meaning of this section."

OHIO

OHIO REV. CODE ANN. § 4561.151 (page: 1953):

"The owner, operator, or person responsible for the operation of an aircraft shall not be liable for loss or damage arising from injuries to or death of a guest, resulting from the operation of said aircraft, while such guest is being transported without payment therefor in or upon said aircraft, unless such injuries or death are caused by the willful or wanton misconduct of such owner, operator, or person responsible for the operation of said aircraft."

OREGON

ORE. REV. STAT. § 30.115 (1953):

"No person transported by the owner or operator of a motor vehicle, an aircraft, a watercraft, or other means of conveyance, as his guest without payment for such transportation, shall have a cause of action for damages against the owner or operator for injury, death or loss, in case of accident, unless the accident was intentional on the part of the owner or operator or caused by his gross negligence or intoxication. As used in this section:

(1) 'Payment' means a substantial benefit in a material or business sense conferred upon the owner or operator of the conveyance and which is a substantial motivating factor for the transportation, and it does not include a mere gratuity or social amenity.

(2) 'Gross negligence' refers to negligence which is materially greater

than the mere absence of reasonable care under the circumstances, and which is characterized by conscious indifference to or reckless disregard of the rights of others."

ORE. REV. STAT. § 30.130 (1953):

"ORS 30.115 shall not relieve a public carrier by aircraft, or any owner or operator of aircraft while the same is being demonstrated to a prospective purchaser, of responsibility for any injuries sustained by a passenger."

## SOUTH CAROLINA

S.C. CODE § 2-21 (1962):

"No person transported by the owner or operator of an aircraft as his guest without payment for such transportation shall have a cause of action for damages against such aircraft, its owner or operator for injury, death or loss in case of accident unless such accident shall have been intentional on the part of such owner or operator or caused by his heedlessness or his reckless disregard of the rights of others."

S.C. CODE § 2-22 (1962):

"Section 2-21 shall not relieve a public carrier of responsibility for any injuries sustained by a passenger being transported by such public carrier."

## SOUTH DAKOTA

S.D. COMP. CODE, § 50-13-15 (1967):

"No person transported by the owner or operator of any aircraft as his guest without compensation for such transportation shall have cause of action for damages against such owner or operator for injury, death, or loss, in case of accident, unless such accident shall have been caused by the willful and wanton misconduct of the owner or operator of such aircraft, and unless such willful and wanton misconduct contributed to the injury, death, or loss for which the action is brought; no person so transported shall have such cause of action if he has willfully or by want of ordinary care brought the injury upon himself."

## UTAH

UTAH CODE ANN. § 2-1-33 (1953):

"No person riding in an aircraft as a guest, without payment for the ride or transportation, nor his personal representative in the event of the death of such guest, shall have a cause of action against any pilot or crewman of such aircraft or its owner or his employee or agent for injury, death, or loss, in case of accident, unless the accident was caused by the intoxication or willful misconduct of the pilot or crewman of such aircraft or its owners or his employee or agent and unless such intoxication proximately resulted in the injury, death or loss for which the action is brought."